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ANSWER AND BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

Supreme Court of the United States

OCTOBER TERM, 1925

No. [redacted] 185

WILL MOORE,
Insurance Commissioner of the State of Oregon,
Appellant,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and NATIONAL SURETY COMPANY.

Appeal from the District Court of the United States for the District of Oregon.
(31,358)

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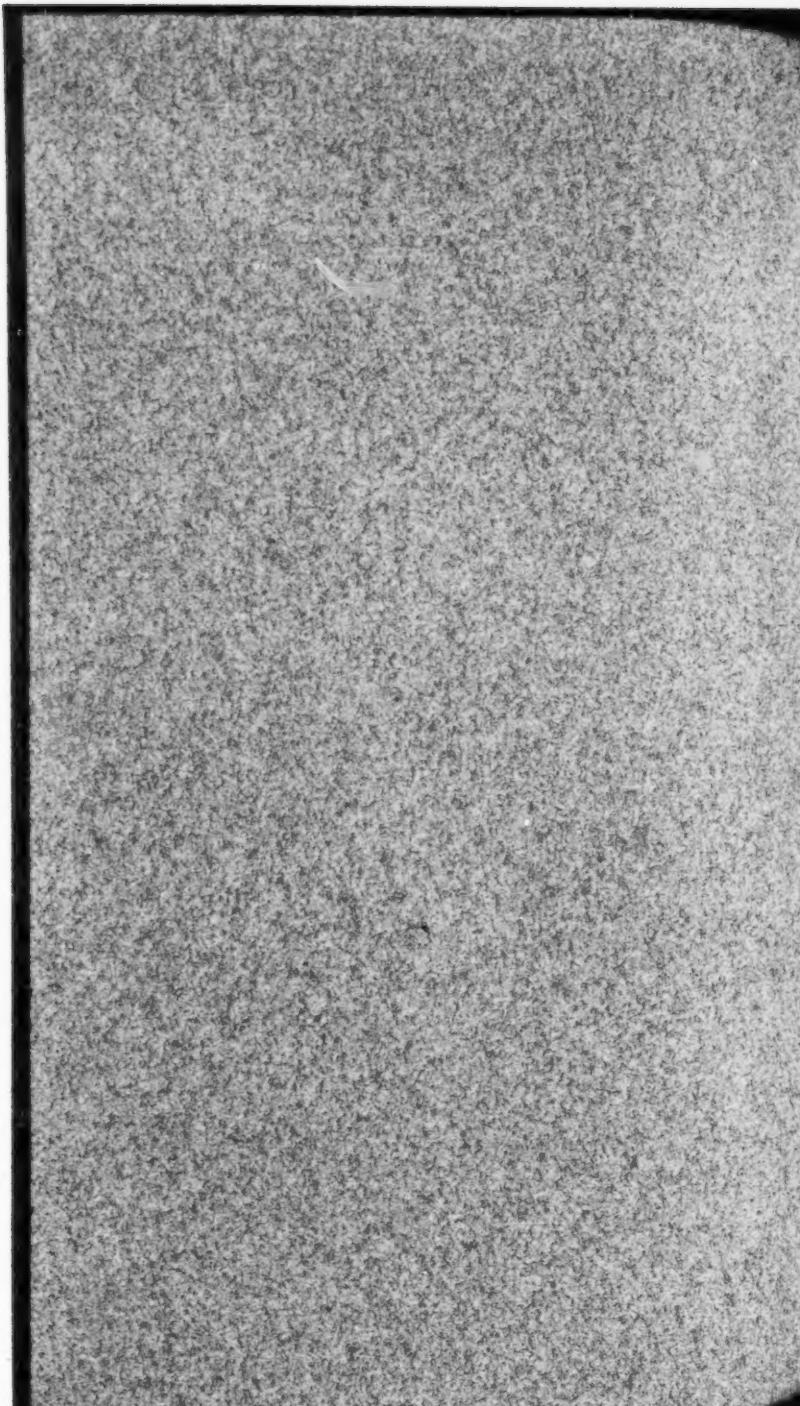

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 635

WILL MOORE,
Insurance Commissioner of the State of Oregon,
Appellant,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and NATIONAL SURETY COMPANY.

Appeal from the District Court of the United States for the District of Oregon.

(31,358)

(The opinion of the United States District Court for the District of Oregon, is reported in 3 Fed. (2d) 652)

ANSWER AND BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

Comes now appellant, Will Moore, Insurance Commissioner of the State of Oregon, and, answering the order of the court to show cause why the appeal herein should not be dismissed for lack of jurisdiction in this court, alleges and shows as follows:

I

The order of the Insurance Commissioner, enforcement of which this suit was brought to enjoin, is an order made by an administrative board or commission created by and acting under the statute of the State of Oregon.

First: That the Department of Insurance of the State of Oregon is an administrative board or commission created by and acting under the statute of the state of Oregon.

Section 6324, Oregon Laws, as amended by chapter 329, Laws of Oregon, 1921, reads as follows:

> "'There shall be in this state a department charged with the execution of the laws relating to insurance, to be called the 'department of insurance of the state of Oregon.' At the head of such department there shall be a state insurance commissioner. He shall be appointed by the governor * * *."

Second: That at all times since March 1, 1923, the defendant herein, Will Moore, the Insurance Commissioner of the State of Oregon, has been and still is the duly appointed, qualified and acting Insurance Commissioner of the State of Oregon. (Par. Fourth, p. 2, Transcript of Record.)

Third: That the Insurance Commissioner, under the provisions of section 6324, Oregon Laws, as amended by chapter 329, Laws of 1921, is made the head of the Department of Insurance of the State of Oregon, and as such head of the Department of Insurance of the State of Oregon, the Insurance Commissioner is by statute granted power, and is commanded to exercise the power, to enforce all the laws of the state relating to insurance, and it is made the duty of such Insurance Commissioner to enforce all the provisions of such laws for the public good.

It is also provided by statute that the Insurance Commissioner shall issue such department rulings, instructions, and orders as he may deem necessary to secure the enforcement of the provisions of the act relating to the business of insurance in the state of Oregon.

Section 3326, Oregon Laws, reads as follows:

"The Insurance Commissioner shall have and exercise the power to enforce all the laws of the state relating to insurance, and it shall be his duty to enforce all the provisions of such laws for the public good. He shall issue such department rulings, instructions and orders as he may deem necessary to secure the enforcement of the provisions of this act, but nothing contained in this act shall be construed to prevent any company or persons affected by any order or action of the Insurance Commissioner from testing the validity of same in any court of competent jurisdiction."

Section 6328, Oregon Laws, as amended by chapter 155, General Laws of Oregon, 1921, provides:

"1. A foreign or alien insurance company may be authorized or licensed to do business in this state when it shall have complied with the following requirements:

* * * * * * *

"7. Every such insurance company or other insurer, excepting a marine insurance company, before it shall receive a license or a renewal of its license to transact the business of making insurance as an insurer in this state, shall file in the office of the Insurance Commissioner its rating schedules and policy forms to be used in the transaction of its business in this state.

* * *."

Subdivision (2), section 6326, Oregon Laws, relating to the powers and duties of the Insurance Commissioner, provides:

"He shall issue all certificates and licenses under the seal of his office provided for by the terms of this act. Before granting certificates of authority to any insurance company to issue policies or make contracts of insurance in this state, the commissioner shall be satisfied by such examination as he may make, or such evidence as he may require, that such company is duly qualified under the laws of this state to transact business herein."

Fourth: That the acts of said Insurance Commissioner are not reviewable by any officer or administrative board of the state of Oregon, and said Insurance Commissioner is, in fact, the Department of Insurance; therefore, the acts of said Insurance Commissioner are, in fact, the acts of the Department of Insurance of the State of Oregon.

Section 6324, Oregon Laws, as amended by chapter 329, Laws of Oregon, 1921.

Section 6326, Oregon Laws.

(Both above quoted.)

Fifth: That during the year 1921, appellees herein filed with the former Insurance Commissioner copies of a form of what is commonly known and designated as a confiscation bond or confiscation coverage on auto-vehicles sold on conditional sales contracts, which bond undertook to indemnify the vendor against any loss which he might sustain caused by the confiscation by municipal, federal or state authorities, of such auto-vehicles by reason of the violation (other than by the insured, or with the permission of the insured) of the provisions of any municipal, federal or state law. That the then Insurance Commissioner approved said form of bond and issued and delivered to the appellees herein his approval and authorization of such confiscation coverage.

That on or about the 20th day of November, 1923, Will Moore, the duly appointed and acting Insurance Commissioner of the State of Oregon, the appellant herein, delivered to each of the appellees herein the order of the Department of Insurance of the State of Oregon, an administrative board or commission of the state of Oregon, created by and acting under the provisions of chapter 203, General Laws of Oregon, 1917, and acts amendatory thereof, issued by said Insurance Commissioner in accor-

dance with law, which order is designated and known as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," which was substantially set out in paragraph ninth of plaintiffs' complaint herein (page 7, Transcript of Record), and which reads in full as follows:

"Department Bulletin No. 25

"Will Moore,
Insurance Commissioner.
(Seal)
Department of Insurance
Salem

"Department Bulletin No. 14, dated April 21, 1921, regarding the use of Confiscation Clause in Oregon, and Department Bulletin No. 17, dated May 25, 1921, regarding Confiscation Coverage, are hereby canceled and approval of confiscation clause heretofore permitted by these bulletins is withdrawn.

"This bulletin is issued in accordance with opinion by the attorney-general of Oregon, regarding the use of confiscation clause in this state. The opinion reads in part as follows:

" '13 Corpus Juris, page 445, Sec. 382—Agreements calculated to impede the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or employed in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.'

* * * * * * *

" 'In my opinion, therefore, such business falls within the definition above quoted, and is void as against public policy and can not be authorized by the Insurance Commissioner.'

"(Signed) Will Moore,
Insurance Commissioner.

"November 20, 1923."

Enforcement of this order was enjoined by the district court upon the final hearing of the present suit, and the defendant, Insurance Commissioner, appealed to this court.

Sixth: The appellant herein, the Insurance Commissioner of the State of Oregon, was acting under the authority granted him by a state statute in issuing the order forbidding an act against public policy, which public policy had been declared by the constitution and statutes of the United States and by the constitution and statutes of the state of Oregon. Such order was issued in the discharge of the duty imposed upon him by section 6326, Oregon Laws, hereinbefore quoted, "to enforce all the provisions of such (insurance) laws for the public good." He had a right to be guided, as to what is for the public good, by the constitution and laws of the United States and the state of Oregon. In fact, he could have no better authority.

The eighteenth amendment to the Constitution of the United States, which operates throughout the entire territorial limits of the United States, and binds all individuals, public officers, courts and legislative bodies within those limits, provides:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.
>
> * * * * * * *"

The National Prohibition Act (41 Stat. 305), popularly known as "The Volstead Act," and acts amendatory thereof, is an act to prohibit intoxicating beverages. Section 26 (p. 315) of said act reads as follows:

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors, in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the treasury of the

United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. * * *"

An amendment to the Constitution of the State of Oregon was proposed by initiative petition filed July 1, 1914, and was adopted by the vote of the people on November 3, 1914, which reads as follows:

(§ 36, Art. I, Constitution of Oregon, p. 94, Oregon Laws.)

"From and after January 1, 1916, no intoxicating liquors shall be manufactured, or sold within this state, except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

"This section is self-executing, and all provisions of the constitution and laws of this state and of the charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section, are hereby repealed."

The Legislative Assembly of the State of Oregon in 1915 enacted chapter 141, General Laws of Oregon, 1915, relating to intoxicating liquors, and prohibiting the manufacture and sale thereof within the state of Oregon. (Sections 2224 to 2224-67, both inclusive, Oregon Laws), which is still in effect.

The Legislative Assembly of the State of Oregon in 1923 enacted chapter 29, General Laws of Oregon, 1923, entitled:

"An act to provide for the forfeiture and sale of boats, vehicles and other conveyances used in the unlawful transportation or possession of intoxicating liquor within the state of Oregon, and for the proceedings in respect thereto, and for disposal of the proceeds of sale of such forfeited property; making it

a felony to place intoxicating liquor in any boat, vehicle or conveyance with intent to cause the same to be forfeited or confiscated, or the owner or person in charge to be made subject to prosecution; and declaring an emergency."

Sections 11 and 12 of said act provide:

"Section 11. Whenever, in proceedings under this act, intoxicating liquor is shown to have been found in or upon any boat, vehicle or other conveyance or in the possession of any person in or upon the same, or is proved to have been transported or kept therein, it shall be presumed that the same was done with the knowledge and consent of the owner and of the person in charge of or possession of such boat, vehicle or other conveyance and with the knowledge and consent of any holder of any lien thereon, but such presumption shall be a disputable one. If any person proceeded against or intervening for the protection of his interest in such proceedings shall establish to the satisfaction of the court, by a preponderance of the evidence, that he is and was at the time of the commission of the act or acts for which said boat, vehicle or other conveyance is subject to forfeiture, the actual and bona fide owner thereof, and that the said boat, vehicle or other conveyance had been taken and was being used by the person or persons in possession thereof at the time of the commission of said unlawful act or acts without his knowledge and consent, and that he had no notice or knowledge of such possession or of such unlawful use of the same, said boat, vehicle or other conveyance shall be ordered by the court to be ordered by the court (*sic*) to be returned to such owner; and * * * if it be established to the satisfaction of the court, at the hearing, that any person has a bona fide lien on such boat, vehicle or other conveyance, that the said lien was created without the lienor having any notice or knowledge that such boat, vehicle or other conveyance was being used or was to be used for the illegal transportation of intoxicating liquor,

and that such ignorance thereof had continued up to the time of said seizure, then said lien shall be ordered to be paid and discharged, so far as the same shall suffice therefor, out of the proceeds of the sale of said property after payment of costs and expenses of the seizure, keeping and sale thereof, and of the proceedings and trial as herein provided for. All liens against property sold under the provisions of this act, established as herein provided, and adjudged to be paid therefrom, shall be transferred from the property to the proceeds of the sale.

"Section 12. When any property is sold under the provisions of this act the proceeds shall be applied as follows:

"1. To the payment of the costs of the forfeiture proceedings and actual expenses of seizing, keeping and preserving the property.

"2. To the payment of any liens adjudged to be paid. * * *"

Public policy will not permit the enforcement of a contract which offers a temptation to violate the law or which undertakes to indemnify another against the consequences of an act which is illegal.

In the case of *Gordon v. Gordon,* 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D, 576, 578, the court discussed public policy as follows:

"There are many acts which the law positively forbids, and for the doing of which some penalty is attached. Whether the prohibition is by the common law or by statute is immaterial. Any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal and void.

"There are also many things which the law does not prohibit, in the sense of attaching penalties, but

which are so mischievous in their nature and tendency that on grounds of public policy they can not be admitted as the subject of a valid contract.

"It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.

"But the notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. Public policy, therefore, is variable; and that which is contrary to the policy of the public at one time may become public policy at another time. No hard and fast rule can be given by which to determine what is public policy.

"It has been said that a contract is against public policy if it is injurious to the interests of the public, or contravenes some established interest of society, or if it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society, and is in conflict with the morals of the time. *Pueblo & A. Valley R. Co. v. Taylor,* 6 Colo. 1, 45 Am. Rep. 512; *McNamara v. Gargett,* 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218.

"The rule must not be understood to mean that in order that a contract may be declared to be against public policy, it must be inimical to morality. Many contracts which are not immoral are nevertheless void on the ground that they are against public policy. *Kohn v. Milcher,* (C. C.) 10 L. R. A. 439, 43 Fed. 641.

"In applying this rule, it has been said that contracts are against public policy when they tend to injustice or oppression, restraint of liberty and natural or legal right, or the obstruction of justice, or the violation of

a statute, or to interfere with or control executive, legislative, or other official action, or to prevent competition whenever a statute or any known rule of law requires it."

People v. Herrin, 284 Ill. 368, 120 N. E. 274, 276.
Greenhood on Public Policy, page 2.
Cooper v. N. P. Ry. Co., 212 Fed. 533, 534, 536.

Public policy demands that every possible precaution be taken to prevent the transportation and sale of intoxicating liquor, and every contract and every law should be strictly construed against all persons who would be enabled to violate the law with impunity and to receive protection against loss on account of such violation.

II

The act of February 13, 1925, 43 Stat., chap. 229, p. 938 (section 238, Judicial Code), authorizes a direct appeal to the United States supreme court from a final judgment or decree of a district court in any suit brought for the purpose of enjoining the enforcement of an order made by an administrative board or commission created by and acting under the statute of a state. Such appeal provision does not depend upon the number of judges sitting in accordance with the law in effect when the case was tried, but depends upon the relief sought by the suit.

First: That it appears from the complaint of plaintiffs herein that this suit was brought in the District Court of the United States for the District of Oregon for the purpose of enjoining and restraining the appellant herein, as head of the Department of Insurance of the State of Oregon, from enforcing that certain order of the Department of Insurance known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," set out in full in paragraph fifth, point I, hereof.

Second: That this suit involves a constitutional question in that plaintiffs allege in their complaint (paragraph Ninth, p. 8, Transcript of Record) as follows:

> "That the said action of the said defendant * * * will impair each and all of said conditional sale contracts, injuriously affect the standing and reliability of plaintiffs as surety companies, entirely destroy the general business of each and good will thereof, in said state, thereby causing inestimable and irreparable damage and injury to said plaintiffs and each of them and depriving plaintiffs of their property without due process of law, in contravention of section 1 of the fourteenth amendment to the Constitution of the United States."

Third: That a final decree was entered in said cause on or about May 18, 1925 (p. 22, Transcript of Record), decreeing that said confiscation coverage is lawful insurance within the state of Oregon, and enjoining and restraining the appellant herein from enforcing the provisions of the order of the Department of Insurance known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," withdrawing the approval of appellant's predecessor, the former Insurance Commissioner, of appellees' confiscation coverage, and further enjoining and restraining appellant from interfering in any manner with or obstructing the transacting of said business by appellees herein, or either or any of them, or by their agents within the state, or the underwriting of confiscation coverage within the state of Oregon.

Fourth: That on or about June 1, 1925, an appeal from the final decree of the District Court of the United States for the District of Oregon in said cause was taken to and is now on file in this court (p. 23, Transcript of Record). That such appeal is authorized by the act of

February 13, 1925, 43 Stat., c. 229, p. 938 (amending section 238 of the Judicial Code), providing for a direct review by the supreme court from a final decree granting a permanent injunction in a suit to restrain the enforcement of an order made by an administrative board or commission created by and acting under a statute of a state, which act reads, in part, as follows:

> "A direct review by the supreme court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following acts or parts of acts, and not otherwise:
>
> * * * * * * *
>
> "(3) An act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a state or of an order made by an administrative board or commission created by and acting under the statute of a state, approved March 4, 1913, which act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit.'"

The act of March 4, 1913, 37 Stat., p. 1013, c. 160 (the same being section 266 of the Judicial Code), as amended by the act of February 13, 1925, 43 Stat., p. 938, c. 229, now reads as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the supreme court, or by any district court of the United

States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the supreme court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the supreme court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; provided, however, that one of such three judges shall be a justice of the supreme court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the state, and to such other persons as may be defendants in the suit; provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the supreme court, or any circuit or distruct judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the supreme court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

* * * * * * *

"The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit."

It is the purpose of the act of March 4, 1913, 37 Stat., p. 1013, c. 160, as amended, to prescribe the manner of procedure in case an administrative order is attacked as unconstitutional, and to provide for a direct appeal to the United States Supreme Court in such suit.

In the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292, it was held that section 266, Judicial Code, in its application to cases involving orders of state administrative boards, was not confined by the amendment of March 4, 1913, to those cases in which the constitutionality of a statute is challenged, but applies also to where the order is attacked as in itself unconstitutional, the court said:

"A doubt has been suggested whether these cases are within section 266 of the Judicial Code, act of March 3, 1911, chapter 231, 36 Stat. 1087, 1162; as amended by the act of March 4, 1913, chapter 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitu-

tionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co. v. Finn*, 235 U. S. 601, 604; *Phoenix Ry. Co. v. Geary*, 239 U. S. 277, 280, 281; *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U. S. 212; *Western & Atlantic R. R. v. Railroad Commission of Georgia*, ante, 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 301, 318; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 555; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest."

Fifth: Although the plaintiffs asked in their complaint (subdivision 1, paragraph Tenth, page 8, Transcript of Record) for an interlocutory injunction, no particular motion was filed bringing this request to the court's attention, and the only decree entered herein was the final decree granting a permanent injunction in this suit, which did not require the presence of three judges under the law as it existed at the time of the final hearing in such case. This fact does not affect appellant's right of appeal herein, direct to this court, as provided by act of February 13, 1925, 43 Stat., chapter 229, page 938 (section 266, Judicial Code), which act became effective May 13, 1925, or five days before the said final decree was rendered on May 18, 1925, and by its very terms (section 14) makes it applicable to this case. Said section 14 reads as follows:

> "That this act shall take effect three months after its approval; but it shall not affect cases then pending in the supreme court, nor shall it affect the right to a

review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

The case of *Brooklyn Union Gas Co. v. Prendergast,* (Dist. Court, E. D. New York) 7 Fed. (2d) 628, 659, was an action involving orders of the Public Service Commission fixing standard of gas and fixing maximum rate. The court said:

> "The motion came on to be heard on the 15th day of April, 1925, and was, at the request of the attorney for the attorney-general of the state of New York, adjourned to May 5, 1925, when it was argued and all briefs finally submitted.
>
> "I agree with all the counsel in this case that the provisions of the act February 13, 1925 (43 Stat. 938), amending section 238 of the Judicial Code, which went into effect May 13, 1925, do not apply, inasmuch as the case was finally submitted before a court consisting of three judges could be called, and that, having been finally submitted before such statute went into effect, this court has power to determine this motion and enter a decree."

While this is not a decision of the supreme court, if it be taken as a correct statement of the law, as to the entry of the decree in a matter pending after final hearing at the time such law became effective, as in the instant case, nevertheless it could not apply to the right of appeal from such decree, because no decree had been entered and no right of appeal had accrued when the act took effect. The provision of the statute granting the right to appeal is purely a matter of remedy in connection with procedure, and as such applies to pending cases from the effective date of the act. This is clearly the provision of the act itself, contained in section 14 above quoted. There-

fore, from the fact that the decree was entered after the new law went into effect, the right of appeal accrued under and is granted and regulated by the amended statute.

It is well settled that the right of appeal or other review in an appellate court is governed by the provisions of the law applicable thereto in force at the time when the judgment is rendered.

Notley v. Brown, 212 U. S. 570.

In the recent case of *Del Pozo et al. v. Wilson Cypress Co.*, 46 Sup. Ct. R. (Advance Opinions No. 4), 57, 58, this court said:

> "The motion to dismiss must be denied. The appeal was taken under sections 128 and 241 of the Judicial Code (Comp. St. §§ 1120, 1218), as existing when the decree of affirmance by the circuit court of appeals was entered, and is not affected by the subsequent act of February 13, 1925, chapter 229, 43 Stat. 936. Section 128 provided that the decisions of the circuit courts of appeals in certain classes of cases should be final, in the sense of being not reviewable by this court on writ of error or appeal; and section 241 provided that the decisions of those courts in other cases should be subject to such a review where the matter in controvery, exclusive of costs, exceeded $1,000. This suit was not within any of the classes named in section 128, and the matter in controversy exceeded $1,000, apart from costs. Therefore the suit was one in which an appeal was admissible."

The right of appeal direct to the United States Supreme Court is given as to the suit itself without regard to interlocutory injunction. No suit can be commenced in good faith merely to obtain an interlocutory injunction.

Hence, the language of the statute under consideration wherein it relates to appeal of "such suits," can not refer to other than all suits brought to restrain the enforcement of state acts and orders as therein specified.

The question involved in this suit is not trivial or insignificant, but is one of very great importance to the State of Oregon as well as to the federal government. The enforcement of the federal, state and municipal laws prohibiting the transportation and sale of intoxicating liquors will be greatly hampered if this appeal is dismissed.

Wherefore, appellant, having shown cause why the appeal herein should not be dismissed for lack of jurisdiction, prays that the decree herein of the District Court for the District of Oregon may be reversed and held for naught.

Respectfully submitted,

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Assistant Attorney-General of the State of Oregon,

GRACE E. SMITH,
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Solicitors for Appellant.

(31,358)

Supreme Court of the United States

OCTOBER TERM, 1925

(No. 685)

No. 185 on the Summary Docket
OCTOBER TERM, 1926

WILL MOORE,
Insurance Commissioner of the State of Oregon,
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vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and NATIONAL SURETY COMPANY.

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellant

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SUBJECT INDEX

TABLE OF CASES CITED

TEXTBOOKS CITED

STATUTES CITED

The opinion of the United States District Court for the District of Oregon is reported in 3 Fed. (2d) 652.

(31,358)

Supreme Court of the United States

OCTOBER TERM, 1925

(No. 635)

No. 185 on the Summary Docket
OCTOBER TERM, 1926

WILL MOORE,
Insurance Commissioner of the State of Oregon,
Appellant,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and NATIONAL SURETY COMPANY.

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellant

The Statement of the Grounds on Which the Jurisdiction of this Court Is Invoked

A final decree of the District Court of the United States for the district of Oregon was entered on May 18, 1925, (R. 22), granting a permanent injunction in a suit in which the relief sought *inter alia* was an injunction suspending and restraining the execution of an order (R. 8.) made by the Department of Insurance of the State of

Oregon, an administrative board or commission acting under and pursuant to the statutes of the State of Oregon, upon the ground of the unconstitutionality of such order. An interlocutory writ of injunction was prayed for preliminary until the hearing of said cause and permanent thereafter, upon the same ground and for the same relief.

The order of the Department of Insurance of the State of Oregon, known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," (R. 24), cancelled and annulled the authorization and license theretofore issued by the appellant's predecessor in office to the appellees herein, permitting the appellees to underwrite contracts of insurance commonly designated as confiscation bond or coverage on vehicles sold on conditional sale contract (R. 2), retaining the title in the vendor. Such contracts of insurance indemnify the vendor against loss caused by confiscation of auto-vehicles by municipal, federal or state authorities by reason of the violation of any municipal, federal or state law.

The appellees herein, in their bill of complaint, (R. 8), contend that the enforcement and execution of said Department Bulletin No. 25 (R. 24) would impair each and all of said conditional sale contracts, injuriously affect the standing and reliability of said appellees as surety companies, and entirely destroy the general business of each and the good will thereof in the state of Oregon, thereby causing inestimable and irreparable damage and injury to the said appellees and each of them, and depriving them of their property without due process of law in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States.

A motion was interposed by appellant to dismiss the plaintiffs' bill of complaint herein (R. 10), on the ground that the same failed to state facts sufficient to constitute

a cause of suit or to entitle the plaintiffs to the relief prayed for in said bill of complaint, which motion was overruled by the court (R. 10), and appellees answered (R. 14).

After the motion of plaintiffs to strike parts of the answer (R. 19) had been sustained, and defendant refusing to plead further, a final decree (R. 22) was entered as follows:

> "That the defendant, Will Moore, as Insurance Commissioner of the State of Oregon, or under color of his office, and his deputies and subordinates, be, and they are enjoined and restrained, so long as plaintiffs shall remain qualified to issue said confiscation coverage under the laws of the State of Oregon:
>
> "(a) From cancelling the existing licenses and authorizations, or any of either, granted the plaintiffs, as in the bill of complaint set forth, permitting the underwriting of said confiscation coverage, within the state of Oregon;
>
> "(b) From withdrawing the approval of the defendant's predecessor as Insurance Commissioner, of plaintiff's confiscation coverage;
>
> "(c) From disapproving said confiscation coverage or refusing permission to the plaintiffs or either or any of them, to issue the same;
>
> "(d) From cancelling or annulling, or attempting to cancel or annul, the authority or license of plaintiffs, or either or any of them, heretofore granted, to transact a surety and indemnity business within the state of Oregon, and particularly restraining and enjoining the defendant, his said deputies and subordinates, from cancelling or annulling or attempting to cancel or annul, the authority of plaintiffs, or either or any of them, to underwrite and issue insurance and indemnity contracts against all direct pecuniary loss which the insured may sustain, caused by the confiscation by municipal, federal or state authorities, of any automobile or automobiles covered by such insurance policy or cover-

age, by reason of the violation (otherwise than by the insured, or with the permission of the insured) of the provisions of any municipal, federal or state law;

"(e) From in any manner interfering with or obstructing the transacting of said business by said plaintiffs, or either or any of them, or by their agents, within said state, or the underwriting of said confiscation coverage within said state, so long as said plaintiff, or plaintiffs shall remain qualified under the laws of said state, to transact said business therein, and that said confiscation coverage be, and the same hereby is, decreed to be lawful surety insurance within the said state, and that the plaintiffs be, and they and each of them are authorized to continue underwriting and issuing the same.

"R. S. BEAN, Judge."

The matter is brought to this court by a direct appeal from said final decree under the authority of the Act of Congress of February 13, 1925, (43 Stat., c. 229, p. 938), which amended section 266 of the Judicial Code (Act of March 4, 1913, 37 Stat., p. 1013, c. 160), which permits a direct appeal to the Supreme Court of the United States from a final judgment or decree of a District Court in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges.

The following cases are relied upon by appellant as sustaining the jurisdiction of the United States Supreme Court:

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 292, 67 L. Ed. 659, 43 S. Ct. 353;

Bluefield Water Works & Improvement Co. v. Public Service Co. of the State of West Virginia, 262 U. S. 679, 683, 67 L. Ed. 1176, 1179, 43 S. Ct. 675, 676;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7, 12, 12 Ann. Cas. 757;

Live Oaks Water Users' Association, et al. v. Railroad Commission of the State of California, 70 L. Ed. (Advance Opinions No. 7), 167, 168, 46 S. Ct. (Advance Opinions No. 6), 149;

Notley v. Brown, 208 U. S. 429, 52 L. Ed. 559, 28 S. Ct. 385;

Del Pozo et al. v. Wilson Cypress Co., 46 S. Ct. (Advance Opinions No. 4), 57, 58, 269 U. S. 82, 70 L. Ed. (Advance Opinions No. 3) 72, 74.

In re Buder, 46 S. Ct. (Advance Opinions No. 17), 557, 558, 70 L. Ed. (Advance Opinions No. 16), 634, 635, 636.

Statement of the Case

This is a direct appeal from a final decree of the District Court of the United States for the district of Oregon, dated May 18, 1925, (R. 22).

On March 26, 1924, the appellees herein filed in the District Court of the United States for the district of Oregon a bill of complaint (R. 1) in which they alleged that a certain order of the Department of Insurance, an administrative board or commission of the state of Oregon, which order is known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," (R. 24), is unconstitutional and deprives appellees of their property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States. Said appellees prayed in said complaint *inter alia* for an interlocutory injunction until the hearing of said cause and permanent thereafter, enjoining and restraining appellant herein from enforcing said order. The said order of the Department of Insurance of the State of Oregon cancelled and annulled the authorization and license previously issued to the appellees herein by appellant's predecessor in office, permitting said appellees to underwrite contracts of insurance commonly designated as confiscation bond or coverage on auto-vehicles sold on conditional sale contract (R. 2), retaining the title in the vendor. Such contracts of insurance indemnify the vendor against loss caused by confiscation of such auto-vehicles by municipal, federal or state authorities by reason of the violation of any municipal, federal or state law.

For authority to issue and enforce said order the Insurance Commissioner relies upon the statutes of Oregon.

Section 6323, Oregon Laws, authorizes the Insurance Commissioner to have and exercise the power to enforce all the laws of the state of Oregon relating to insurance and to issue such departmental rules, instructions and orders as he may deem necessary to secure the enforcement of such laws.

The insurance code of Oregon (sections 6322 to 6604, Oregon Laws, and acts amendatory thereof) contains specific provisions relating to the admission of certain classes of foreign insurance corporations to do insurance business of certain specified kinds within the state of Oregon.

A foreign insurance corporation doing business within the state of Oregon can legally transact only such business as the laws of Oregon authorize. All forms of insurance contracts must first be approved by the Insurance Commissioner of Oregon. (§ 6328, Oregon Laws, as amended by subd. 7, § 1, c. 155, General Laws of Oregon, 1921.)

It is the contention of appellant that the policy of confiscation coverage issued by appellees, the form of which policy is set out in full in plaintiffs' bill of complaint herein (R. 2), is void both as against public policy and because it is not permitted under any statute of the state of Oregon.

A final decree was entered in said suit on May 18, 1925, granting the relief prayed for in plaintiffs' bill of complaint and holding said confiscation coverage to be lawful surety insurance within the state of Oregon, from which decree the defendant Insurance Commissioner of the State of Oregon has appealed direct to this court, under the provisions of the Act of Congress, February 13, 1925, (43 Stat, c. 229, p. 938), which amended section 266 of the Judicial Code (Act of March 4, 1913, 37 Stat. p. 1013, c. 160).

The decision of the district court that the insurance in question is valid surety insurance is necessarily based upon the conclusion that such insurance is not contrary to public policy nor the state law, and, therefore, that a denial by the appellant of permission to underwrite the same deprives appellees of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Assignments of Error (R. 24)

The appellant assigns for error:

I

That the court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from cancelling the existing licenses and authorizations, or any of either, granted the plaintiffs as in the bill of complaint set forth, permitting the underwriting of said confiscation coverage, within the state of Oregon.

II

That the court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from enforcing that certain order of said Insurance Commissioner, made under and by virtue of the statutes of the state of Oregon, complained of in paragraph ninth of plaintiffs' complaint, withdrawing the approval of the former Insurance Commissioner of plaintiffs' confiscation coverage, which order is known as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," (R. 24), and reads as follows:

> "Department Bulletin No. 25.
>
> "Department Bulletin No. 14, dated April 21, 1921, regarding the use of Confiscation Clause in Oregon, and Department Bulletin No. 17, dated May 25, 1921, regarding Confiscation Coverage, are hereby cancelled and approval of confiscation clause heretofore permitted by these bulletins is withdrawn.

"This bulletin is issued in accordance with opinion by the Attorney-General of Oregon, regarding the use of confiscation clause in this state. The opinion reads in part as follows:

" '13 Corpus Juris, page 445, Sec. 383—Agreements calculated to impede the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or employed in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.

* * * *

" 'In my opinion, therefore, such business falls within the definition above quoted, and is void as against public policy and can not be authorized by the Insurance Commissioner.'

"(Signed) WILL MOORE, Insurance Commissioner.

"November 20, 1923."

III

The court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from disapproving said confiscation coverage or refusing permission to the plaintiffs, or either or any of them, to issue the same.

IV

The court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from cancelling or annulling, or attempting to cancel or annul, the authority or license

of plaintiffs, or either or any of them, to transact a surety and indemnity business within the state of Oregon, and particularly from cancelling or annulling, or attempting to cancel or annul, the authority of plaintiffs, or either or any of them, to underwrite and issue insurance and indemnity contracts against all direct pecuniary loss which the insured may sustain, caused by the confiscation by municipal, federal or state authorities, of any automobile or automobiles covered by such insurance policy, or coverage, by reason of the violation (otherwise than by the insured or with the permission of the insured), of the provisions of any municipal, federal or state law.

V

The court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from in any manner interfering with or obstructing the transacting of said business by said plaintiffs or either or any of them, or by their agents, within said state, or the underwriting of said confiscation coverage within said state.

VI

That the court erred in holding and decreeing that said confiscation coverage is lawful surety insurance within the state of Oregon and in authorizing said plaintiffs and each of them to continue underwriting and issuing the same.

VII

The court erred in sustaining plaintiffs' motion to strike out parts of defendant's answer to the bill of complaint herein.

Explanatory Note

In order to place before the court what may be termed the atmosphere of this case, that is, the surrounding facts and conditions which furnish the setting of the legal question presented for decision by this appeal, we would respectfully show that it represents a most vital and important interest of the state of Oregon, namely, the enforcement of its laws and the laws of the United States within its borders, and indirectly furnishes a material assistance to the United States government in enforcing its laws throughout its jurisdiction. If the indemnity contracts against loss on account of confiscation of motor vehicles for violation of the law, involved in this proceeding, are valid, then a very serious hindrance to the enforcement of the prohibitory liquor laws is erected. Such confiscation indemnity contracts, if held legal, would make it possible for an illicit importer or distiller of intoxicating liquor to secure such number of motor vehicles as desired and furnish them to distributors on conditional sale contracts to be used in the sale and distribution of such intoxicating liquor, and for such importer or distiller to be entirely protected by means of such confiscation indemnity from any loss in case of the confiscation of any of such motor vehicles for use in such unlawful traffic. It would be next to impossible, or at least very difficult, to prove that the vendor of such vehicles, that is, the importer or distiller, had any knowledge of the illegal use to be made of such vehicles by the vendees, in the absence of direct proof of such conspiracy. Even where no such conspiracy exists, the incautious sale of motor vehicles upon conditional sales contracts to any and all persons without adequate investigation as to their reliability and the probable use to be made of such vehicles, and the vendors' interest in such

vehicles represented by the unpaid balances of the purchase price, being fully protected and indemnified by insurance contracts, such as those here involved, would tend to the same result. It is, therefore, in the interest of organized and unorganized violation of the prohibition laws to have such contracts declared legal insurance, thus assisting in breaking down the enforcement of such laws.

At this time, when strenuous efforts are being made to nullify and secure the repeal of the Eighteenth Amendment to the United States Constitution and the laws carrying the same into effect, public policy demands that contracts of the nature of those here in question shall not be permitted because they are a material assistance and protection of the lawless element which is striking at the very heart of our civilization, which is the obedience to, and enforcement of, our laws. This is not an insignificant or paltry notion of a sparsely settled community on the far away shores of the western sea, but an important and vital interest of the people of the whole United States. Thus the state of Oregon, though fighting alone, is representing and fighting for the welfare of the entire people and the permanence of their institutions.

For these reasons it is hoped that the court may not consider the cause of appellant as light or trivial in any respect, but as substantial, basic and fundamental.

Points and Authorities

I

JURISDICTION

(a) A direct appeal to the Supreme Court of the United States from a final decree of a district court is authorized in any suit in which the hearing on an application for an interlocutory injunction is required to be before three judges; that is, in any case in which such suit and application are brought for the purpose of suspending or restraining the enforcement or execution of an order made by an administrative board or commission created by and acting under and pursuant to the statutes of a state, upon the ground of the unconstitutionality of such order.

43 Stat. c. 229, p. 938. (§ 266, Judicial Code);

37 Stat. p. 1013, c. 160 (as amended by Act of Congress, February 13, 1925, 43 Stat. c. 229, p. 938);

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 292, 67 L. Ed. 659, 43 S. Ct. 353;

Bluefield Water Works & Improvement Co. v. Public Service Co. of the State of West Virginia, 262 U. S. 679, 683, 67 L. Ed. 1176, 1179, 43 S. Ct. 675, 676;

Live Oaks Water Users' Association et al. v. Railroad Commission of the State of California, 46 S. Ct. (Advance Opinions No. 6), 149, 70 L. Ed. (Advance Opinions No. 7), 167, 168;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7, 12, 12 Ann. Cas. 757;

Notley v. Brown, 208 U. S. 429, 52 L. Ed. 559, 28 S. Ct. 385;

Del Pozo et al. v. Wilson Cypress Co., 46 S. Ct. (Advance Opinions No. 4), 57, 58, 269 U. S. 82, 70 L. Ed. (Advance Opinions No. 3) 72, 74;

In re Buder, 46 S. Ct. (Advance Opinions No. 17), 557, 558, 70 L. Ed. (Advance Opinions No. 16) 634, 635, 636.

(b) The order of the Insurance Commissioner is an order made by an administrative board created by, under and acting under the statutes of the state of Oregon.

§ 6324, Oregon Laws, as amended by c. 329, General Laws of Oregon, 1921;

§ 6326, Oregon Laws;

§ 6328, Oregon Laws, as amended by c. 155, General Laws of Oregon, 1921.

II

ON THE MERITS

The contracts of insurance involved in this case are contrary to public policy as declared by the laws of the United States and of the State of Oregon, and are, therefore, void.

Eighteenth Amendment, Constitution United States;

§ 26, 41 Stat, 305, 315;

§ 3450 R. S., (§ 6352 U. S. Comp. Stat.);

42 Stat. 223, § 5, (§ 10138 4/5 c., U. S. Comp. Stat., Ann. Suppl. 1923);

§ 36, Article I, Constitution of Oregon;

§§2224 to 2224-67, both inclusive, Oregon Laws;

§§ 11 and 12, c. 29, General Laws of Oregon, 1923;

§ 17, 31 C. J. p. 425;

Gordon v. Gordon, 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D, 576, 578;

People v. Herrin, 284 Ill. 368, 120 N. E. 274, 276;

Greenhood on Public Policy, p. 2;

Cooper v. N. P. Ry. Co., 212 Fed. 533, 534, 536;

Midland Motor Co. v. Norwich Union Fire Insurance Society, Ltd., et al., 72 Mont. 583, 234 Pac. 482, 484;

Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Insurance Society, Ltd., and Fidelity & Deposit Company of Maryland, 72 Mont. 69, 232 Pac. 198, 36 A. L. R. 1495;

Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393;

6 R. C. L. p. 757, § 165;

31 C. J. p. 425, § 17.

III

Such insurance contracts are contracts of indemnity and not of suretyship or guaranty.

12 R. C. L. p. 1058, § 7;

31 C. J. p. 419, § 1;

28 C. J. p. 886, § 1; p. 890, §§ 4 and 5;

12 R. C. L. p. 1057, § 6.

IV

1. Appellees are not authorized to enter into such contracts of indemnity insurance either

(a) Under their authority pleaded in their complaint herein,

Paragraphs Second and Third, Plaintiffs' Bill of Complaint, (R. 1).

or

(b) By the laws of the State of Oregon relating to insurance.

§ 6322 O. L.;

§ 6337 O. L.;

§ 6343 O. L.

2. Such contracts are, therefore, ultra vires and void. 32 C. J. p. 989, § 21.

V

The action of the Insurance Commissioner, the appellant herein, in issuing said Department Bulletin No. 25 and in enforcing the same, is not contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States because appellees have no right to make such contracts.

12 C. J. p. 1200, § 966;

German Alliance Insurance Co. v. Barnes, 189 Fed. 769, 775, 778, 779;

Atlantic Coast Line Co. v. Riverside Mills, 219 U. S. 186, 31 S. Ct. 164, 165, 55 L. Ed. 167;

§ 6343, Oregon Laws.

Argument

We will endeavor to present the facts fully in the following pages with reference to the jurisdiction of this court because we are uncertain whether that question is still before the court or was disposed of upon the order to show cause why the same should not be dismissed, heretofore issued in this case, and in response to which a brief was filed by appellant setting forth his claim to the right of a direct appeal to this court. As we would understand, the action of the court in setting down the case for hearing, and not dismissing it, settles the question of the jurisdiction, but lest it be considered as still under consideration we have attempted to set forth such authorities as are deemed applicable, together with the jurisdictional facts and the statement of our understanding of their application.

I

AS TO JURISDICTION

(a) A direct appeal to this court from the final decree of a district court is authorized by Act of Congress of February 13, 1925, (43 Stat. c. 229, p. 938) which amends section 266 of the Judicial Code (37 Stat. p. 1013, c. 160), in any suit in which the hearing on an application for an interlocutory injunction is required to be before three judges, which suit and application are brought for the purpose of suspending and restraining the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of a state upon the ground of the unconstitutionality of such order.

It appears from the bill of complaint in the instant case that this suit was brought for the purpose of restraining the appellant herein, as head of the Department of Insurance of the State of Oregon, from enforcing that

certain order of the Department of Insurance known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," set out in full at page 24, Transcript of Record.

The said Act of February 13, 1925, 43 Stat., c. 229, page 938 (amending § 238 of the Judicial Code), providing for a direct review by the Supreme Court from a final decree granting a permanent injunction in a suit restraining the enforcement of an order made by an administrative board or commission created by and acting under the statute of a state, reads in part as follows:

> "A direct review by the supreme court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following acts or parts of acts, and not otherwise:
>
> * * * *
>
> "(3) An act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a state or of an order made by an administrative board or commission created by and acting under the statute of a state, approved March 4, 1913, which act is hereby amended by adding at the end thereof "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit.' "

Section 266 of the Judicial Code, (Act of March 4, 1913, 37 Stat., page 1013, chapter 160, as amended by the Act of February 13, 1925, 43 Stat., page 938, chapter 229,) now reads as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or exe-

cution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the supreme court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the supreme court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the supreme court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; provided, however, that one of such three judges shall be a justice of the supreme court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the state, and to such other persons as may be defendants in the suit; provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the supreme court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory

injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the supreme court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

* * * *

"The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit."

In the case at bar, the said Department Bulletin No. 25, is directly attacked in plaintiffs' bill of complaint herein (R. 7 and 8), as being unconstitutional. In paragraph ninth of said bill of complaint, it is alleged:

"Ninth. That on or about the 20th day of November, 1923, said defendant wrongfully and unlawfully, and in excess of the powers conferred upon the Insurance Commissioner of the State of Oregon, by the laws and statutes thereof, and pretending to act as such Insurance Commissioner while so doing, delivered to each of the plaintiffs herein a so-called "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," signed by said defendant, by which said defendant attempted to cancel and annul the said authorization and license to underwrite said confiscation coverage, previously granted to each of said plaintiffs by defendant's predecessor and recognized by defendant himself as such Insurance Commissioner, for the entire period of his incumbency of said office prior to the date of said notice, and by which said alleged 'Bulletin No. 25,' said defendant

also attempted to withdraw the approval of his said predecessor in office and of himself as such officer, of the said confiscation bond and the underwriting thereof, all on the alleged ground and pretended claim of said defendant that said confiscation coverage shows upon its face that it is a contract calculated to impede the regular administration of justice, in that it serves to encourage the transportation of intoxicating liquors by auto-vehicle in violation of the laws of the United States and of the State of Oregon, and is, therefore, void as against public policy, and upon the protest of these plaintiffs that the said confiscation bond is not illegal, as aforesaid, but is a valid contract of insurance authorized by the laws and statutes of said state of Oregon, and that they are entitled to underwrite same, the said defendant has informed plaintiffs and each of them, and now threatens that unless they and each of them shall forthwith and entirely refrain from underwriting said confiscation coverage within the state of Oregon, defendant, as such Insurance Commissioner, will cancel and annul the licenses of plaintiffs to transact any and all surety business whatsoever within said state, thereby preventing these plaintiffs from enjoying any of the corporate privileges for which at all times herein mentioned they have been and still are duly qualified under the laws of said state.

"That the said action of the said defendant is arbitrary, capricious and unauthorized by any statutory regulation of said state, is a mere assumption of nonexistent authority, and will jeopardize all of plaintiffs' said Confiscation Bonds, the business of underwriting same and the avails thereof, will impair each and all of said conditional sale contracts, injuriously affect the standing and reliability of plaintiffs as surety companies, entirely destroy the general business of each and good will thereof, in said state, thereby causing inestimable

and irreparable damage and injury to said plaintiffs and each of them and depriving plaintiffs of their property without due process of law, in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States."

(1) Application of the statute to departmental orders.

Section 266, Judicial Code, in its application to cases involving orders of state administrative boards, is not confined by the amendment of March 4, 1913, to those cases in which the constitutionality of a statute is challenged, but applies also to where the order is attacked as in itself unconstitutional.

In the case of *Oklahoma Natural Gas Co. v. Russell,* 261 U. S. 290, 292, 67 L. Ed. 659, 43 S. Ct. 353, the court said:

> "A doubt has been suggested whether these cases are within section 266 of the Judicial Code, Act of March 3, 1911, chapter 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, chapter 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute,' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co. v. Finn,* 235 U. S. 601, 604; *Phoenix Ry. Co. v. Geary,* 239 U. S. 277, 280,

281; *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission,* 260 U. S. 212; *Western & Atlantic R. R. v. Railroad Commission of Georgia,* ante, 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. *Louisville & Nashville R. R. Co. v. Garret,* 231 U. S. 298, 301, 318; *Atlantic Coast Line R. R. Co. v. Goldsboro,* 232 U. S. 548, 555; *Grand Trunk Western Ry Co. v. Railroad Commission of Indiana,* 221, U. S. 400, 403. But it plainly was intended to enlarge, not to restrict the law. We mention the matter simply to put doubts to rest."

In the case of *Bluefield Water Works & Improvement Co. v. Public Service Co. of the State of West Virginia,* 262 U. S. 683, 67 L. Ed. 1179, 43 S. Ct. 675, 676, the court said:

"* * * The petition alleges that the order is repugnant to the Fourteenth Amendment, and deprives the company of its property without just compensation and without due process of law, and denies it equal protection of the laws. A final judgment was entered, denying the company relief and dismissing its petition. The case is here on writ of error.

"1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the state, on the ground of repugnancy to the federal Constitution.

"The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the state. The

prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. * * *"

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7, 12, 12 Ann. Cas. 757.

In the case of *Live Oak Water Users' Association et al. v. Railroad Commission of the State of California*, (No. 7, decided Jan. 4, 1926,) Advance Opinions, 70 L. Ed. 167, 168, 46 S. Ct. (Advance Opinions No. 6), 149, 150, the court held that for the purposes of jurisdiction of the Supreme Court of the United States an order of a public service commission fixing rates for service by public utility must be treated as though an act of the legislature.

The court further held that it had no jurisdiction of an appeal unless it affirmatively appears that in the court below there was duly drawn in question the validity of a statute or an authority exercised under the state because of repugnance to the Constitution of the United States.

(2) Application of the statute to cases heard but not decided when it took effect.

The said Act of February 13, 1925, (43 Stat. c. 229, p. 938, 942, became effective May 13, 1925. The final decree in this suit was entered May 18, 1925. Thus in the case at bar no decree had been entered and no right of appeal had accrued at the time the Act of 1925 became effective. Therefore, from the fact that the decree was entered after the new law went into effect, the right of appeal accrued under and is granted and regulated by the amended statute. This is particularly true since the Act by its very terms specially provides:

"Section 14. That this act shall take effect three months after its approval; but it shall not affect cases

then pending in the supreme court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

By the rule of elimination declared in the statute, it must apply to all cases in which the judgment or decree appealed from was entered subsequent to its taking effect.

It is well settled that the right of appeal or other review in an appellate court is governed by the provisions of the law applicable thereto in force at the time when the judgment is rendered.

> *Notley v. Brown*, 208 U. S. 429, 52 L. Ed. 559, 28 S. Ct. 385.

The provisions of the statute granting the right to an appeal is purely a matter of remedy in connection with procedure, and, as such, applies to pending cases from the effective date of the act. This is clearly the provision of the act itself, contained in section 14 above quoted. Therefore, from the fact that the decree was entered after the new law became effective, the right of appeal accrued under and is granted and regulated by the amended statute.

In the recent case of *Del Pozo et al. v. Wilson Cypress Co.*, 269 U. S. 82, 70 L. Ed. (Advance Opinions No. 3) 72, 74, 46 S. Ct. (Advance Opinions No. 4) 57, 58, this court said:

> "The motion to dismiss must be denied. The appeal was taken under sections 128 and 241 of the Judicial Code (Comp. Stat. §§ 1120, 1218), as existing when the decree of affirmance by the circuit court of appeals was entered, and is not affected by the subsequent act of February 13, 1925, chapter 229, 43 Stat. 936."

(3) The right of direct appeal applies to all suits drawing in question the validity of state legislative action as in conflict with the United States Constitution; and unquestionably so when, as in this case, an interlocutory injunction is prayed for in the complaint.

The right of direct appeal to the United States Supreme Court is given as to the suit itself without regard to the issuance or denial of an interlocutory injunction. No suit can be commenced in good faith merely to obtain an interlocutory injunction, hence the language of the statute under consideration herein relating to an appeal of "such suits" can not refer to other than *all suits* brought to restrain the enforcement of state statutes and orders made by administrative boards or commissions acting under and pursuant to state statutes in which the hearing on an application for an interlocutory injunction is required to be before three judges, that is, upon the ground of their unconstitutionality, also in which the final hearing is required to be before three judges upon the same ground. The suits to which section 266 of the Judicial Code, as amended by the Act of 1925 (Comp. Stat. Supp. § 1243), apply, are discussed in the case of *In re Buder*, 46 S. Ct. (Advance Opinions No. 17) 557, 558, 70 L. Ed. (Advance Opinions No. 16) 634, 635, 636, in which the court said:

> (p. 557) "An interlocutory injunction had not been prayed for in the bill, or otherwise sought. * * *
>
> (p. 558) "The suits to which section 266 (Judicial Code) relates are those in which the relief sought is an 'interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by

an administrative board or commission acting under and pursuant to the statutes of such state * * * upon the ground of the unconstitutionality of such statute.' In any such suit the application for an interlocutory injunction was required to be heard before three judges, and from their decree a direct appeal lay to this court; but, prior to the Act of February 13, 1925, a final hearing in the suit was had before a single judge. Compare *Patterson v. Mobile Gas Co.*, 269 U. S. —, 46 S. Ct. 445, 70 L. Ed. —, No. 225, decided April 26, 1926. From his decree a direct appeal to this court could be founded only upon the provisions of section 238 as originally enacted. *Shaffer v. Carter*, 252 U. S. 37, 44, 40 S. Ct. 221, 64 L. Ed. 445. Where the jurisdiction of the district court was invoked upon other federal grounds, as well as the one attacking the constitutionality of the state statute, an appeal might be taken to the circuit court of appeals, with ultimate review in this court if the case was of the class within its jurisdiction. *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, 53, 42 S. Ct. 244, 66 L. Ed. 458. To remove the existing anomaly, and to prevent that which would otherwise have resulted from the repealing provisions of the Act of February 13, 1925, that act further amended section 266, as amended by Act of March 4, 1913, c. 160, 37 Stat. 1013, being Comp. St. § 1243, by adding at the end thereof:

" 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit.' Comp. Stat. Supp. 1925, § 1243.

"As so amended, section 266 also permits a direct appeal to this court from the final decree in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges."

All of the elements constituting the right of a direct appeal from the district court to this court are found in the instant case. The bill of complaint (R. 8) prays for an interlocutory injunction, and in paragraph 9, supra (R. 7 and 8), bases plaintiffs' right to an injunction upon the allegation that the issuance of said departmental bulletin and its enforcement by the appellant would cause "inestimable and irreparable damage and injury to said plaintiffs, and each of them, and deprive plaintiffs of their property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States." It is, therefore, a suit which required the hearing on the application for an interlocutory injunction to be before three judges, as stated in the last paragraph above quoted from the case of *In re Buder,* as constituting the class of cases in which a direct appeal is now authorized.

Appellant herein maintains that the court erred in decreeing that the defendant, as Insurance Commissioner, is enjoined and restrained from in any manner interfering with or obstructing the transacting of the business of underwriting said contracts of confiscation coverage, and in holding and decreeing said confiscation coverage to be lawful surety insurance within the state of Oregon, and in authorizing said plaintiffs (appellees herein) and each of them to continue underwriting and issuing the same.

In order to reach such conclusion, the court necessarily had to pass upon the constitutionality of said order, Department Bulletin No. 25 (R. 24). If the insurance is lawful and valid surety insurance as held by the court, and the appellant had no authority to issue or enforce the order in question, as also held by the court, the action of the appellant, which was enjoined by the final decree, was in contravention of the Fourteenth Amendment, as alleged

in the complaint. The suit is, therefore, in all respects, squarely within the provisions of section 266 of the Judicial Code, as amended.

(b) The order of appellant known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon." enforcement of which this suit was brought to enjoin, upon the ground of its unconstitutionality, is an order made by an administrative board or commission created by and acting under the statutes of the state of Oregon.

Section 6324, Oregon Laws, as amended by chapter 329, General Laws of Oregon, 1921, reads as follows:

> "There shall be in this state a department charged with the execution of the laws relating to insurance, to be called the 'Department of Insurance of the State of Oregon.' At the head of such department there shall be a State Insurance Commissioner. He shall be appointed by the Governor * * *."

At all times since March 1, 1923, Will Moore, the defendant herein, has been and still is the duly appointed, qualified and acting Insurance Commissioner of the State of Oregon. (Bill of Complaint, paragraph 4, R. 2).

Section 6326, Oregon Laws, reads, in part as follows:

> "GENERAL POWERS AND DUTIES OF COMMISSIONER.
>
> (1) *Enforce Insurance Laws and Make Rulings.* The Insurance Commissioner shall have and exercise the power to enforce all the laws of the state relating to insurance, and it shall be his duty to enforce all the provisions of such laws for the public good. He shall issue such department rulings, instructions and orders as he may deem necessary to secure the enforcement of the

provisions of this act, but nothing contained in this act shall be construed to prevent any company or persons affected by any order or action of the Insurance Commissioner from testing the validity of same in any court of competent jurisdiction.

"(2) *To Issue Certificates and Licenses.* He shall issue all certificates and licenses under the seal of his office provided for by the terms of this act. Before granting certificates of authority to any insurance company to issue policies or make contracts of insurance in this state, the commissioner shall be satisfied by such examination as he may make, or such evidence as he may require, that such company is duly qualified under the laws of this state to transact business herein."

Section 6328, Oregon Laws, as amended by chapter 155, General Laws of Oregon, 1921, provides:

"1. A foreign or alien insurance company may be authorized or licensed to do business in this state when it shall have complied with the following requirements:

* * * * *

"7. Every such insurance company or other insurer, excepting a marine insurance company, before it shall receive a license or a renewal of its license to transact the business of making insurance as an insurer in this state, shall file in the office of the Insurance Commissioner its rating schedules and policy forms to be used in the transaction of its business in this state."

The acts of said commissioner are not reviewable by any officer or administrative board of the state of Oregon, and the said Insurance Commissioner is, in fact, the department of insurance; therefore, the acts of said Insurance Commissioner are, in fact, the acts of the Department of Insurance of the state of Oregon.

Section 6324, Oregon Laws, as amended by Chapter 329, General Laws of Oregon, 1921.

Section 6326, Oregon Laws.

(Both above quoted.)

Said bulletin was issued by appellant under the authority granted him by a state statute, and forbids an act against public policy, which had been declared by the constitution and statutes of the United States and of the State of Oregon, as well as ultra vires under the provisions of the state law relating to insurance, both of which we will discuss under their appropriate heads. Such order was issued in the discharge of the duty imposed upon him by section 6326, Oregon Laws, hereinbefore quoted, "to enforce all the provisions of such (insurance) laws for the public good." He had a right to be guided as to what is for the public good by the Constitution and laws of the United States and the State of Oregon. Really, he could have no better authority.

II

ON THE MERITS

The insurance contracts in question are void as against public policy.

The Eighteenth Amendment to the Constitution of the United States, which binds all individuals, public officers, courts and legislative bodies, provides:

> "Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

* * * * *

The National Prohibition Act (41 Stat. 305), popularly known as "The Volstead Act," and acts amendatory thereof, is an act to prohibit the manufacture, sale, transportation and possession of intoxicating liquors for beverage purposes. Section 26 (p. 315) of said act reads as follows:

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors, in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of the trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the

cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. * * *"

42 Stat. p. 223, c. 134, § 5, (§10138 4/5c, U. S. Comp. Stat. Ann. Supp. 1925) provides:

"All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibtion Act or of this act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35, of Title II of the National Prohibition Act, shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor. (Nov. 23, 1921) * * *."

§ 3450 R. S. (§ 6352 U. S. Comp. Stat. Compact Ed., 1918) provides, among other things, for the confiscation of vehicles used in violation of law.

An amendment to the Constitution of the State of Oregon was proposed by initiative petition filed July 1, 1914, and was adopted by the vote of the people on November 3, 1914, which reads as follows:

(§ 36, Art. I, Constitution of Oregon, p. 94, Oregon Laws.)

"From and after January 1, 1916, no intoxicating liquors shall be manufactured, or sold within this state, except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

"This section is self-executing, and all provisions of the constitution and laws of this state and of the charters and ordinances of all cities, towns and other municipalities therein in conflict with the provisions of this section, are hereby repealed."

The Legislative Assembly of the State of Oregon, in 1915, enacted chapter 141, General Laws of Oregon, 1915, relating to intoxicating liquors, and prohibiting the manufacture and sale thereof within the state of Oregon. (Sections 2224 to 2224-67, both inclusive, Oregon Laws), which is still in effect.

Section 2224-4, Oregon Laws, provides:

"Except as hereinafter provided in this amendatory act it shall be unlawful for any person to receive, import, possess, transport, deliver, manufacture, sell, give away or barter any intoxicating liquor within this state; and the place of delivery of any intoxicating liquor is hereby declared the place of sale; provided, that it shall not be unlawful for any person to have in his possession intoxicating liquor lawfully procured and in the possession of such person within this state at the time of the taking effect of this amendatory act, or lawfully obtained or received under the provision of this act." (L. 1915, c. 141, § 5; L. 1917, c. 40, § 1.)

Said Legislative Assembly in 1923 enacted chapter 29, General Laws of Oregon, 1923, entitled:

"An act to provide for the forfeiture and sale of boats, vehicles and other conveyances used in the unlawful transportation or possession of intoxicating liquor within the state of Oregon, and for the proceedings in respect thereto, and for the disposal of the proceeds of sale of such forfeited property; making it a felony to place intoxicating liquor in any boat, vehicle or conveyance with intent to cause the same to be forfeited or confiscated, or the owner or person in charge to be made subject to prosecution; and declaring an emergency."

Sections 11 and 12 of said act provide:

"Section 11. Whenever, in proceedings under this act, intoxicating liquor is shown to have been found in or upon any boat, vehicle or other conveyance or in the possession of any person in or upon the same, or is proved to have been transported or kept therein, it shall be presumed that the same was done with the knowledge and consent of the owner and of the person in charge of or possession of such boat, vehicle or other conveyance and with the knowledge and consent of any holder of any lien thereon, but such presumption shall be a disputable one. If any person proceeded against or intervening for the protection of his interest in such proceedings shall establish to the satisfaction of the court, by a preponderance of the evidence, that he is and was at the time of the commission of the act or acts for which said boat, vehicle or other conveyance is subject to forfeiture, the actual and bona fide owner thereof, and that the said boat, vehicle or other conveyance had been taken and was being used by the person or persons in possession thereof at the time of the commission of said unlawful act or acts without his knowledge and consent, and that he had no notice or knowledge of such possession or of such unlawful use of the same, said boat, vehicle or other conveyance shall be

ordered by the court to be ordered by the court (sic) to be returned to such owner; and * * * if it be established to the satisfaction of the court, at the hearing, that any person has a bona fide lien on such boat, vehicle or other conveyance, that the said lien was created without the lienor having any notice or knowledge that such boat, vehicle or other conveyance was being used or was to be used for the illegal transportation of intoxicating liquor, and that such ignorance thereof had continued up to the time of said seizure, then said lien shall be ordered to be paid and discharged, so far the same shall suffice therefor, out of the proceeds of the sale of said property after payment of costs and expenses of the seizure, keeping and sale thereof, and of the proceedings and trial as herein provided for. All liens against property sold under the provisions of this act, established as herein provided, and adjudged to be paid therefrom, shall be transferred from the property to the proceeds of the sale.

"Section 12. When any property is sold under the provisions of this act the proceeds shall be applied as follows:

"1. To the payment of the costs of the forfeiture proceedings and actual expenses of seizing, keeping and preserving the property.

"2. To the payment of any liens adjudged to be paid. * * *"

Public policy will not permit the enforcement of a contract which offers a temptation to violate the law or which undertakes to indemnify another against the consequences of an act which is illegal. 31 C. J. p. 425, § 17.

In the case of *Gordon v. Gordon,* 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D, 576, 578, the court discussed public policy as follows:

"There are many acts which the law positively forbids, and for the doing of which some penalty is attached. Whether the prohibition is by the common

law or by statute is immaterial. Any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal and void.

"There are also many things which the law does not prohibit, in the sense of attaching penalties, but which are so mischievous in their nature and tendency that on grounds of public policy they can not be admitted as the subject of a valid contract.

"It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.

"But the notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. Public policy, therefore, is variable; and that which is contrary to the policy of the public at one time may become public policy at another time. No hard and fast rule can be given by which to determine what is public policy.

"It has been said that a contract is against public policy if it is injurious to the interests of the public, or contravenes some established interest of society, or if it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society, and is in conflict with the morals of the time. *Pueblo & A. Valley R. Co. v. Taylor,* 6 Colo.1, 45 Am. Rep. 512; *McNamara v. Gargett,* 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218.

"The rule must not be understood to mean that in order that a contract may be declared to be against public policy it must be inimical to morality. Many contracts which are not immoral are nevertheless void on the ground that they are against public policy. *Kohn v. Milcher,* (C. C.) 10 L. R. A. 439, 43 Fed. 641.

"In applying this rule, it has been said that contracts are against public policy when they tend to injustice or oppression, restraint of liberty and natural or legal right, or the obstruction of justice, or the violation of a statute, or to interfere with or control executive, legislative, or other official action, or to prevent competition whenever a statute or any known rule of law requires it."

People v. Herrin, 284 Ill. 368, 120 N. E. 274, 276.
Greenhood on Public Policy, page 2.
Cooper v. N. P. Ry. Co., 212 Fed. 533, 534, 536.

The question as to the validity of a policy of insurance indemnifying the conditional vendor of an automobile against confiscation thereof for the violation of any state, federal or municipal laws, by his conditional vendee, is a new one, and there appear to be but two reported decisions which touch upon this point.

The case of *Midland Motor Co. v. Norwich Union Fire Insurance Society, Ltd., et al.,* 72 Mont. 583, 234 Pac. 482, 484, involved a policy insuring the vendor of an automobile against its confiscation for violation of the intoxicating liquor law. The automobile in question was seized on January 4, 1921, while being used in transporting a load of whisky, and on January 8, 1921, was turned over to the federal authorities and thereafter confiscated and sold under an order of the United States District Court for the District of Montana.

The court said:

"The National Prohibition Act (41 Stat. 305 (U. S. Comp. St. Ann. Supp. 1923) § 10138¼ et seq.), became effective on October 28, 1919, and title 2, section 35 (§ 10138½v) thereof provides:

"'All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency.'

"In the cases of *U. S. v. One Haynes Automobile* (C. C. A.) 274 F. 926, *Lewis v. U. S.* (C. C. A.) 280 F. 5, *U. S. v. One Packard Truck,* (D. C.) 284 F. 394, and *McDowell v. U. S.* (C. C. A.) 286 F. 521, it was expressly declared that in so far as it provided for the confiscation and forfeiture of automobiles used in the illegal transportation of intoxicating liquors the provisions of section 3450 were repealed by the National Prohibition Act. To the same effect is the case of *U. S. v. Yuginovich,* 256 U. S. 450, 41 S. Ct. 551, 65 L. Ed. 1043.

"By the supplementary Prohibition Act of November 23, 1921, c. 134, § 5, 42 Stat. 223 (Comp. St. Ann. Supp. 1923, § 10138 4/5 c), the Congress reenacted 'all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted.' See *U. S. v. Stafoff,* 260 U. S. 477, 43 S. Ct. 197, 67 L. Ed. 358.

"From this it follows that the automobile in question could not have been confiscated in January, 1921, under section 3450, since no authority for such a confiscation then existed under that section, and, therefore, upon the record before us, we must hold that the confiscation was under title 2, section 26, of the National Prohibition Act (Comp. St. Ann. Supp. 1923, § 10138½mm).

"It is not questioned in this case but that it is competent and legal to insure the vendor of an automobile against the confiscation thereof for a violation of the National Prohibition Act by a person other than the vendor. Since this in effect is all that the policy and confiscation clause in question did, we must hold that the same are not void and unenforceable as against public policy.

"The question whether a policy of insurance against confiscation under the provisions of section 3450, as reenacted, would be void as against public policy, is not presented in this case and no opinion is expressed thereon."

It will be observed that the court expressly stated that the question of public policy under said § 3450 R. S., as reenacted, was not presented in this case.

The case of *Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Insurance Society, Ltd., and Fidelity & Deposit Co. of Maryland,* 72 Mont. 69, 232 P. 198, 36 A. L. R. 1495, involved the liability of the insurance company for loss caused by the confiscation of an automobile by Canadian officials, under a bond agreeing to indemnify the conditional vendor of an automobile sold on conditional sale contract, against direct pecuniary loss which the assured may sustain caused by the confiscation by municipal, federal or state authorities of such automobile by reason of the violation of the provisions of any municipal, federal or state law. The question of public policy did not arise in this case. The defendants attacked the sufficiency of the complaint and insisted that it disclosed upon its face that the seizure and confiscation of the automobile by Canadian officials within the Dominion of Canada, is not "confiscation by municipal, federal or state authorities" by reason of any "municipal, federal or state law," within the meaning of the language of the coverage bond. Defendants contended that these terms apply solely to officers and laws of the United States, and hence that the car was never insured against confiscation in Canada. The court said:

> "We can not narrow the range of the insurer's obligation by giving to the terms 'municipal,' 'federal,' and 'state,' the technical and restricted construction for which the defendants contend, for under the facts disclosed by the record we think they apply with equal propriety to Canada. * * *
>
> "The judgment is affirmed as to the defendant Fidelity & Deposit Company of Maryland. * * *"

The case of *Taxicab Motor Co. v. Pacific Coast Casualty Co.,* 73 Wash. 631, 132 Pac. 393, is a case cited by courts and textbook writers in support of the contention that insurance against violation of law is valid. However, an examination of said case will reveal the fact that the insurance was not against a violation of law but was against another liability. The policy involved in said case, insured against loss or expense resulting from claims upon the assured for damages on account of bodily injuries or death accidentally suffered, while the policy was in force, by any person or persons, and caused by any of the taxicabs operated by the respondent. While the policy was in force an automobile driven by an employe of the Taxicab Company ran against an employe of the city of Spokane in the performance of his duties, and inflicted bruises and wounds upon him from which he died a few days later. An action was brought by the Taxicab Company against the insurance company upon the bond. As a defense the insurance company alleged that the policy was issued and accepted on the express understanding and agreement that in no event should the insurance company be liable thereon if the Taxicab Company, in operating its automobiles, permitted its employes to run them at a rate of speed exceeding the speed limit prescribed by the ordinances of the city of Spokane, and that the automobile operated by the taxicab employe which ran down and killed the employe of the city, was, at that time, being run at a rate of speed exceeding the speed limit provided by such ordinances.

The court held that the contract was not void simply because the accident happened while the taxicab driver was violating the law.

In other words, *it was in spite of and not because of the violation of the law* that damages were payable to the widow of the man who was killed by the taxicab driver.

The violation of the law was incidental and outside of the contract, *and was not the basis upon which the contract was founded.*

The several textbook writers, who cite this case, appear to have overlooked the distinction between a severable contract which may be held valid in spite of an incidental violation of the law and a contract, the basis of which, and the only circumstance under which payment can be made, depend upon a violation of the law.

Public policy demands that any contract which lends its aid to those who would violate the law, or makes the consequences of such violation less certain or drastic, shall not be permitted.

In 6 R. C. L. p. 757, § 165, it is said:

> "It is an established general principle that contracts having for their subject-matter any interference with the due enforcement of the laws are against public policy, and are therefore void. The law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration."

In 31 C. J., p. 425, § 17b, it is said:

> "A contract or bond by which one party undertakes to indemnify the other against the consequences of an act which is illegal, because of its being contrary either to positive law or public policy, and which the parties either actually or constructively know to be so, is illegal and void."

Under the circumstances involved in the issuing of the insurance contracts under consideration, it is not seen how the district court could hold and decide that such contracts were not contrary to public policy, defined and discussed

in the foregoing quotations of authority. The willingness of the conditional vendor of a motor vehicle to sell the same and retain the title in himself upon a small partial payment being made, to anyone willing to make such payment, and also pay the premium upon an insurance policy covering the usual liabilities and also a policy or contract fully indemnifying such vendor against any loss of the remainder of the purchase price, by reason of the confiscation of such motor vehicle for violation of the law, not actually committed by him or under his authority or direction, and his action thereon together with the surety company can not be questioned or denied to be a great assistance to one engaged in the unlawful transportation of intoxicating liquors. If it were not possible for him to obtain a motor vehicle under such circumstances, in many cases he would not obtain it at all, or would hesitate longer in taking the chances which he does of being apprehended and having the motor vehicle which he might be operating confiscated. He would be much more careful and hence violate the law less brazenly and less often if it were necessary for him to purchase and pay for the motor vehicle which he uses in such transactions and thereby render himself liable to the full loss of the price of such vehicle.

It is the policy of the law, both federal and state, that persons engaged in the unlawful transportation of intoxicating liquor shall suffer, in addition to other penalties, that of the loss of all vehicles used by them in such transportation. The entrance of the insurance companies into the transaction makes it possible for one to engage in such criminal transactions without incurring such risk. It is by means of such confiscation coverage policies that one of the principal stings of the law is taken away. It is urged by appellees that the contracts under consideration are not made in contemplation of the violation of the law by or

under the direction or consent of the insured, that is, the conditional sales vendor. We may grant that it is true that they are not made under his immediate direction or control. He is at least entitled to his presumption of innocence to that extent; but if he did not know, and the surety company did not know that there is a liability that a part of the motor vehicles sold under conditional sales contracts will be confiscated for law violations, there would be no subject-matter upon which such insurance contracts could operate. If there were no risk recognized, there could be no insurance. These facts are axiomatic and require no proof.

It is noticed from the form of contract pleaded by appellees in their complaint (R. 2) that the insured therein is not required to and does not warrant any facts or circumstances with reference to the reliability, honesty or worthiness of confidence of the vendee of the motor vehicle covered by the confiscation insurance, but he only warrants that he has had no notice or knowledge thereof. (R. 4). He is not required to make any inquiry or investigation of such matter, as a prudent person would do if he were proceeding at his own risk, but under the contract the less he knows the better for him and for the business of the surety companies in making such coverage contracts. Such contract of indemnity puts a premium upon his ignorance and want of diligence in the respect which would otherwise be of major importance to him, with the result that the law would be more generally observed and less frequently violated. It is, therefore, clearly a winking at and an assistance in the violation of the law by both the conditional vendor in making such sale, on account of his being fully protected therein by the surety company, and on the part of the surety company in making such contract of indemnity. They are, therefore, both engaged, not in a

direct violation of the law but in furnishing the means and making it easier for a third party to do so, and hence are acting directly contrary to public policy, as hereinbefore defined, in entering into such contracts. It follows that appellees would not be denied any right of contract which they have under the constitution, or any other property, contrary to the Fourteenth Amendment of the Constitution of the United States, or at all, and that the order or bulletin of appellant withdrawing their authorization to make such contracts was not in contravention of the Constitution of the United States, as alleged by appellees and held by the district court.

III

The insurance contracts involved in this suit are properly classified as indemnity insurance, as distinguished from suretyship or guaranty insurance.

The following quotations defining "suretyship" and "guaranty on the one hand, and indemnity insurance on the other, make it entirely clear that the insurance here under consideration belongs to the class of indemnity insurance and not of suretyship or guaranty."

In 12 R. C. L., p. 1058, § 7, it is said:

> "There is an important difference between a contract of *guaranty* and one of *indemnity*. The former is a *collateral* undertaking and presupposes some contract or transaction to which it is collateral, while the latter is essentially an *original* contract. If one indemnifies another from loss from the acts of a third party, though there is privity *between the parties to the indemnity*, there may be *no* privity or obligation *as between the parties* to the indemnity and such *third* party; but in the contract of guaranty it is essential that there be *two*

different contracts, and hence there is always privity of contract between the principal debtor and the creditor. An obligation may constitute both a guaranty and an indemnity. Thus, a building contractor's bond may contain a covenant to indemnify the obligee against loss from work performed and materials furnished for the building and may contain also a covenant whereby the obligor guarantees the performance of the work and the furnishing of materials." (Italics ours.)

In 31 C. J., p. 419, § 1, it is said:

"The word 'indemnity' means protection or exemption from loss or damage past or to come; it signifies to reimburse, to make good, and compensate for loss or injury, to make sure, to protect from injury, etc. Generally speaking, the word carries with it two meanings: (1) in the sense of giving security; and (2) in the sense of relieving a party from liability for damage already accrued; and in a broad and general sense indemnity is that which is given to a person to prevent his suffering damage. *But as relating to the contract of indemnity it may be more specifically defined as the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.*" (Italics ours.)

In 28 C. J., p. 886, § 1, it is said:

"The term 'guaranty' * * * is a collateral promise or undertaking by one person to answer for the payment of some debt or the performance of some contract or duty in case of the default of another person, who in the first instance is liable for such payment or performance; a collateral promise or undertaking to pay a debt owing by a third person in case the latter does not pay. It is an agreement by one person to answer to another for the debt, default or miscarriage of a third person; and in some jurisdictions this latter definition is given by statute. * * *"

and at page 890, § 4, it is said:

"In a broad sense a contract of guaranty corresponds with that of suretyship, the distinction between them being merely technical, and a transaction which is called in some cases an absolute guaranty is denominated by other courts a contract of suretyship. A guaranty is like a suretyship in the sense that it is an engagement to answer for the debt, default or miscarriage of another, and for this reason the terms 'surety' and 'guarantor' or 'guaranty' are often confounded and used interchangeably. The two subjects, however, have some important distinguishing features, which are not easy to define by any brief and comprehensive formula.

"§ 5. Statements of distinctions. * * * The contract of the surety is a direct original agreement with the obligee that the very thing contracted for shall be done, whereas a guarantor enters into a cumulative collateral engagement, by which he agrees that his principal is able to and will perform a contract which he has made or is about to make, and that if he defaults the guarantor will, upon being notified thereof, pay the resulting damages. *A surety is an insurer of the debt or obligation, while a guarantor is an insurer of the ability or solvency of the principal.* * *" (Italics ours.)

In 12 R. C. L., p. 1057, § 6, it is said:

"Suretyship.—The distinction between the contract of guaranty and the contract of suretyship is not always clear. * * * The vital difference between the contract of a surety and that of a guarantor is that a surety is charged as an original promisor, while the engagement of a guarantor is a collateral undertaking. A surety is a party to the principal obligation, undertaking together with the principal debtor that it shall be performed, while the guarantor is not a party to the principal obligation. In case of suretyship there is but one contract binding the surety and the promisor, but in the case of a guaranty there are two contracts,

one binding the principal debtor and one binding the guarantor. * * * The agreement of the surety is that he will do the thing which the principal has undertaken: the agreement of the guarantor is that the principal will do what he is bound to perform. Another distinction is that a promise of a surety is supported by the consideration on which the promise of the principal is founded, and no other need be proved, while the engagement of a guarantor must be founded on some new or independent consideration, except in those cases where the guaranty is given at the time the debt is contracted by the principal, and so may be considered as connected with it. * * *"

The liability against loss which the appellees assume under the contract pleaded in the complaint is stated therein (R. 3) as follows:

"Now therefore, in consideration of — dollars ($—) premium, the Fidelity and Deposit Company of Maryland, hereinafter called this company, subject to all the terms and conditions stated in this obligation, agrees to indemnify the insured against all direct pecuniary loss which the insured may sustain caused by the confiscation by municipal, federal or state authorities of said automobile by reason of the violation (otherwise than by the insured or with the permission of the insured) of the provisions of any municipal, federal or state law.

"Subject to the following conditions:

"1. The liability hereunder shall in no case exceed the actual cash value of said automobile, at the time of such confiscation, nor two-thirds (2/3) of the purchase price thereof, nor the amount of the total unpaid instalments of the purchase price thereof payable by the vendee, exclusive of any interest thereon, less in each instance the amount realized by the insured from the proceeds of the sale of said automobile under the judg-

ment or order of confiscation; and the liability of this company hereunder shall be fully satisfied and discharged by the return of said automobile to the insured at the place of seizure or its recovery by, the insured. This company shall not be liable hereunder for any loss through physical damage to, or depreciation in value of, said automobile, nor for any loss through fire, theft, collision, or through any of the perils insured against under the above mentioned policy."

These provisions follow the recital (R. 2) in such contract that another policy of insurance has been issued upon the same motor vehicle covered by the confiscation indemnity contract now under consideration. Such other policy of insurance is referred to in the second of the two paragraphs above quoted, as covering "loss through fire, theft, collision, or through any of the perils insured against under the above mentioned policy." An examination of these provisions of the contract shows that it covers only loss that may be sustained by the insured conditional sales vendor on account of contingency which may arise, that is, confiscation of the vehicle, but which contingency, or confiscation, is not contracted for or engaged to be brought about by either of said parties or by a third party. This is a necessary and indispensable element of a surety or guaranty contract. Such requirement is discussed and clearly set forth by the authorities above quoted, defining and distinguishing these different kinds of insurance.

There is no undertaking on the part of the conditional vendee that he will not subject the motor vehicle involved in the transaction to confiscation; in fact, as already pointed out, the only provision upon this subject is as follows (R.):

"5. It is warranted that the insured has had no notice or knowledge that the vendee is unreliable, dishonest or unworthy of confidence."

Appellant maintains that the said contract lacks every element necessary in a contract of guaranty or surety insurance, but on the other hand contains all of the elements of a contract of indemnity.

IV

Appellees are not authorized to enter into contracts of indemnity in the state of Oregon.

(a) The only kind of insurance which they have pleaded in their complaint that they are authorized to contract for in the state of Oregon is that of (R. 1) "guaranteeing the fidelity of persons in places of trust, the performance of contracts and bonds and undertakings, including the signing thereof as surety, as defined by section 6377, Lord's Oregon Laws, (Insurance Code aforesaid.)"

Incidentally it is here noticed that section 6377, *Lord's Oregon Laws,* which is the official publication of the laws of Oregon preceding that entitled "Oregon Laws," relates to "Obstructing Highway and Driving Stock—Penalty," and was repealed by chapter 334, General Laws of Oregon, 1917, while section 6377, Oregon Laws, which is the current publication, relates to the payment of dividends to its stockholders by domestic insurance companies. Hence the reference in the complaint above quoted to section 6377, "Lord's Oregon Laws," adds nothing to the preceding allegation.

It is further alleged in paragraph 3 of the complaint (R. 1) that each of the surety companies, appellees herein, "* * * satisfied the said Insurance Commissioner that it was a surety company * * * fully and legally organized and authorized under its charter, and laws of the state

of its origin, to become surety upon contracts, bonds, undertakings, obligations, recognizances and guaranties; * * * it made written application to said commissioner for authority to transact its said business in said state; * * * it paid to such commissioner, in advance, all license fees and charges required of it to transact its said business in said state, all as required by sections 6328, 6437 and 6438, Oregon Laws (Insurance Code aforesaid), and each of said plaintiffs having in all other respects complied with the insurance laws of said state of Oregon, the then insurance commissioner of said state did issue to each of said plaintiffs a certificate of authority and license to transact its said business with said state, and * * * each of said plaintiffs has been at all times herein mentioned and still is duly and legally qualified to transact such business in the state of Oregon, and now has a license from said Insurance Commissioner so to do."

Clearly, this language above quoted specifies only the insurance business of surety and guaranty. It does not contain any allegation whatever of the qualifications, if any, of the appellees to engage in any other insurance business, including contracts of indemnity. Section 6328, Oregon Laws, as amended by chapter 155, General Laws of Oregon, 1921, states the general requirements of foreign insurance companies to obtain authority to transact the insurance business in the state of Oregon, while sections 6437 and 6438, Oregon Laws, all cited in the foregoing portion of appellees complaint, provide the conditions under which surety companies may do business in said state, and relate only to such companies and such business. Said three sections are, for convenience, set forth in appendix A attached to, and made a part of, this brief. An examination of said last two sections clearly shows that compliance with their requirements only authorizes insurance

companies to transact the surety business as therein specified, and it is specifically provided among other things, in paragraph 1 of said section 6437, Oregon Laws:

> "* * * If such surety company is engaged in any other business it shall pay fees in addition to the above license for the license or licenses required by law for the transaction of such other insurance business. * * *"

The complaint nowhere alleges that any of the appellees have complied with this requirement or qualified to transact any other insurance business in the state of Oregon than the business of surety and guaranty insurance. In paragraph 3 of said section 6438, Oregon Laws, after specifying the phases of the surety and guaranty insurance business which may be transacted by a foreign surety company which has qualified as such, this language appears:

> "* * * and generally, it shall be lawful for such a company or corporation to enter into any contract of indemnity or security with any person, partnership, association or corporation; provided, that such contract is not otherwise prohibited by law or against public policy."

It is noticed that this language contains the word, "indemnity." The rule of *ejusdem generis* is so well settled as not to permit of citation of authority at this time; that is, where several acts or things, such as kinds of business are specified in a statute and general authority is given to perform other acts or transact other business, such other acts or business must be within the same kind or class as those particularly specified. This rule and its application in the present instance is strengthened by the fact that the expression is "indemnity or security," showing that the indemnity is of the nature of security, which is a part of the surety or guaranty business authorized in said paragraph.

Manifestly, the contracts authorized by the clause here quoted could not include life insurance, fire insurance and other well-defined classes of insurance known to the law. Therefore, the words "any contract of indemnity or security" do not widen the scope of the authority conferred in said section beyond those of the kind specified.

Particular attention is called to the concluding clause in the last above quotation. "provided that such contract is not otherwise prohibited by law or against public policy." We have already discussed the question of public policy, and we here call attention to the fact that the statutory provision upon which appellees apparently rely restricts them from making contracts contrary to public policy, and thus recognizes the effect of public policy which we have already urged upon the court. We will also discuss the nature of business forbidden by law to be transacted by surety companies, in a succeeding paragraph.

When the allegations of the complaint, including the statutory provisions sought to be imported into it by reference, setting forth the kind of business which they claim they are authorized to transact, are considered, the conclusion can not be escaped that they have pleaded themselves out of court in so far as it concerns the transaction of any kind of insurance business other than surety or guaranty. We have already shown by competent authority that the contracts now under consideration are of the class of indemnity, and not surety or guaranty, and even if they were, which we do not admit, they are not of the kind particularly specified in the complaint or in the statutory provisions therein cited.

(b) In addition to what has already been shown as to the lack of authority of appellees to make the indemnity contracts in question, we now call attention to the fact

that the statutes of the state of Oregon do not authorize them to do so. Section 6322, Oregon Laws, defines insurance generally as follows:

> "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event, whereby the insured or his beneficiary suffers loss or injury."

This general definition is limited by the provisions of section 6337, Oregon Laws, classifying and defining the various kinds of insurance which may be transacted in the state of Oregon, reading, so far as pertinent, as follows:

> "Definition of Insurance. (1) *Of Insurance Company.* A company, association, partnership or individual engaged in the business of insurance, or suretyship, or of guaranteeing against liability, loss or damage, or of entering into contracts substantially amounting to insurance, shall be deemed an insurance company and shall not transact such business unless the business is authorized or permitted by the laws of the state of Oregon, and all laws regulating the same and applicable thereto have been complied with.
>
> "(2) *Classification and Separation of.* A company may be licensed to make any or all insurance and reinsurance comprised in any one of the following numbered subdivisions:
>
> "First. *Fire and Marine Insurance.* * * *
>
> "*Vessels and Common Carriers.* * * *
>
> "Second. *Life Insurance.* * * *
>
> "Third. *Disability Insurance.* * * *
>
> "Fourth. *Casualty Insurance.* * * *
>
> "Fifth. *Surety Insurance.* Guaranteeing the fidelity of persons holding places of trust, the performance of contracts and bonds and undertakings, including the signing thereof as surety. * * *"

This particular definition of surety insurance is the exact language used by appellees in their complaint (R. 1) as being the kind of insurance which they are qualified to transact in the state of Oregon. This, in connection with the statutory provisions relied upon by appellees in their complaint, already discussed herein, limits the kind of insurance which a surety company may transact in the state of Oregon, and this term, without any question whatever, includes the appellees herein.

The district court, in his opinion (R.11) relies upon certain provisions of sections 6338 and 6343, Oregon Laws. Said section 6338 reads as follows:

> "(1) Any insurance company which has qualified to transact its appropriate business in this state may be licensed to transact any of the classes of insurance defined in this section or permitted under the laws of this state and which it may transact under the provisions of its charter or articles of incorporation and the laws of the state in which it has its home office or United States department office. (2) Provided, that if such company elects to transact more than one of such classes of insurance, it shall be required to pay an additional fee of $25 per annum for each of such additional classes as it may be authorized to transact under its certificate of authority and the annual license which may be issued to it."

The district court, in his opinion, quotes only the first sentence of said section and omits the important provision contained in the second sentence, requiring any insurance company wishing to transact any additional class of business to qualify by paying an additional license fee, and that such additional business must be one which it is authorized to transact under its certificate of authority. Said section 6343 enumerates the various kinds of insurance which may be transacted in the state of Oregon, and

adds, "and insurance against any other loss or casualty which may lawfully be the subject of insurance and for which no other provision is made by the laws of this state." This is the language quoted from said section (R. 11) by the district court. It is noticed, however, that such language does not specify that every insurance company, without exception, may transact any other kind of insurance, as stated in the foregoing quotation, without complying with the requirements authorizing it to transact an additional kind of insurance. Said requirements being specified in section 6338, Oregon Laws, above quoted, and section 6437, Oregon Laws, shown in appendix A, and already discussed in a preceding paragraph.

Clearly, therefore, the language of neither of said sections 6338 and 6343, Oregon Laws, adds anything to the authority of appellees, or any surety company qualified only to transact the surety or guaranty business in the state of Oregon.

It can not be questioned that a state has the right to prescribe the terms upon which a foreign insurance company can transact business within its borders, and that such foreign company can transact only such business as the law of the state authorizes. This rule is well stated in the following quotation from 32 C. J., p. 989, § 21:

> "The state has power either wholly to exclude a foreign insurance company from doing business within its limits or to impose on the company such terms and conditions as it may deem proper as a condition precedent to its right to do business within the state.
>
> * * * * *
>
> "On compliance with the laws of a state a foreign company is entitled to carry on business in that state, but it can only do such business as is authorized by the statute, although its charter authorizes a greater scope of business. * * *"

Appellees are, therefore, not denied any right of contract or other property right by being prevented from entering into such confiscation indemnity contracts for the reason that they have not shown any authority in their complaint to make the same, nor do the laws of the state of Oregon relating to insurance authorize such indemnity contracts to be made by surety companies qualified only to transact the surety business.

V

The action of the Insurance Commissioner of the state of Oregon, appellant herein, in issuing said "Department Bulletin No. 25," and in enforcing the same, is not in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In 12 C. J., page 1200, section 966, it is said:

> "The right to make contracts is both a liberty and a property right, and is within the protection of the guaranties against the taking of liberty or property without due process of law. Neither the state nor federal governments, therefore, may impose any arbitrary or unreasonable restraint on the freedom of contract. *This freedom, however, is not an absolute, but a qualified, right, and is, therefore, subject to reasonable restraint in the interest of the public welfare.*" (Italics ours.)

In the case of *German Alliance Insurance v. Barnes*, 189 Fed. 769, 775, 778, 779, the court discussed the right of a state to regulate foreign insurance companies doing business within the state, and said:

> (p. 775) "It may also be conceded the exercise of the legislative power of fixing or regulating rates and charges for services performed or engagements under-

taken is an appropriation by the state of private property; for it is a taking away from the contracting parties of their right of private contract which is private property. * * *"

The court also quoted from the case of *Atlantic Coast Line Co. v. Riverside Mills,* 219 U. S. 186, 31 S. Ct. 164, 55 L. Ed. 167, as follows:

"'It is obvious from the many decisions of this court that there is no such thing as absolute freedom of contract. Contracts which contravene public policy can not be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests.'"

The court then said:

(p. 779) "Without attempting a further discussion of the proposition relied on by complainant in its elaborate brief and argument, or a reference to the many authorities therein cited and elaborated upon in argument, it will suffice to say in the light of recent decisions, which must control here, I am of the opinion the act challenged does not violate any right secured to complainant by the provisions of the fourteenth amendment to the federal constitution, and that the act will be upheld as within the legitimate exercise of the lawmaking power of the state."

CONCLUSION

Appellant would sum up his presentation of this matter as follows:

That appellees are not deprived of any right guaranteed to them by the Fourteenth Amendment of the United

States Constitution, as alleged in their complaint and held by the district court, by the issuance of the departmental bulletin in question and its enforcement, revoking and denying their licenses to underwrite the policies of confiscation indemnity specified in said order and involved in this suit because appellees had no right to make such contracts, as judged, (1) by the nature of said contracts, the same being contrary to public policy in that they lend an assistance to, and furnish a material means for, the violation of the laws of the United States and the State of Oregon, and are used extensively for such purpose; (2) by their own pleading in this case upon which they must stand or fall; and (3) by the laws of the State of Oregon specifying the conditions upon which foreign insurance companies may be admitted to transact business in the state of Oregon and the kinds of insurance business which they may transact and the conditions thereof.

We believe we have fully established all of these positions, any one of which is sufficient to reverse the decree of the district court, because said decree, based upon the holding of the court that the insurance in question is lawful surety insurance within the state of Oregon, can not be in accordance with law if any of said points are well taken. We respectfully urge, therefore, that the decree of the district court be reversed.

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Appendix A

Section 6328, Oregon Laws. Foreign or Alien Insurance Companies

(1) *May Obtain License*—A foreign or alien insurance company may be authorized or licensed to do business in this state when it shall have complied with the following requirements:

(2) *Certified Copy of Charter, etc., to Be Filed*—It shall file with the insurance commissioner a certified copy of its charter, articles of incorporation or deed of settlement and a statement of its financial condition and business in the United States in such form and detail as he may require, signed and sworn to by at least two of its executive officers or the United States manager.

(3) *Amount of Capital Stock Required; Deposit of Securities by Foreign Life Insurance Company*—It shall satisfy the insurance commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact; that it has a fully paid-up capital or a deposit capital in the United States over all liabilities therein, equal to two hundred thousand dollars ($200,000), with a surplus of not less than one hundred thousand dollars ($100,000), except as otherwise provided in this act; provided, however, that no requirement of capital or surplus herein shall apply to life insurance companies possessing assets amounting to one million dollars ($1,000,000) or more.

(4) *Deposit of Securities Required*—When required by the provisions of this act, it shall deposit with the insurance commissioner, in his official capacity, securities of the amount and character required of similar companies incorporated under the laws of this state, or in lieu thereof, unless such deposit is a special deposit required by this act to cover liabilities in this state only, shall furnish a certificate of deposit from the state official having custody of the securities showing to the satisfaction of said commissioner that it has securities to an amount not less than that required by this act deposited with the insurance commissioner, state treasurer or other proper official of some one of the states of the United States

in which it is licensed to do business, and that the same are held for the benefit and security of the policyholders of such company in the United States, which certificate shall be renewed whenever required by the insurance commissioner.

(5) *Certificate of Authority to Do Business*—Upon compliance with the requirements of this section and all other requirements imposed on such company by existing laws and upon payment of the fees and charges imposed by law, the commissioner shall issue to it a certificate of authority to transact business in this state, which on thirty days' notice may be revoked if the insurance commissioner shall find that its condition in the United States is unsound or its surplus of admitted assets in the United States over all its policy liabilities, pertaining to the United States business, as defined in this act, has not been maintained and is less than that required herein.

(6) *Granting Certificate of Authority, Domestic Company*—A domestic insurance company shall be granted a certificate of authority to transact any kind or class of insurance permitted by the provisions of the insurance laws of this state and provided for in its articles of incorporation upon its compliance with all the laws of this state and the regulations of the insurance department relating to such companies and the payment of the fees and charges imposed by law, which certificate may be revoked on thirty days' notice by the insurance commissioner or he may suspend same temporarily if he deems necessary or advisable. Cause for revocation or suspension of such certificate shall exist if its capital is found to be impaired or the required surplus has not been maintained or if its transactions have been found to be in violation of the law.

(7) *Policy Forms and Rating Schedules Must Be Filed*—Every such insurance company or other insurer, excepting a marine insurance company, before it shall receive a license or a renewal of its license to transact the business of making insurance as an insurer in this state, shall file in the office of the insurance commissioner its rating schedules and policy forms to be used in the transaction of its business in this state. Every such company and its agents shall observe its rating schedules and shall not deviate therefrom when making insur-

ance until amended or corrected rating schedules shall have been filed in the office of the insurance commissioner, and such company or its agents shall not discriminate between risks of essentially the same hazard in its application of its rates for insurance; provided, that nothing herein contained shall prevent any mutual insurance company or any inter-insurance or reciprocal insurance exchange from making return of unabsorbed premiums to members at the end of the policy period. Acceptance of the schedule of a rating bureau as provided in subdivision 8 of section 6389, Oregon Laws, by a company which is a member of such bureau, shall be deemed a compliance with this act as to the filing of rating schedules. [L. 1917, c. 203, § 3-b, pp. 318, 319. Amended, L. 1921, c. 155, p. 304.]

Section 6437, Oregon Laws. Surety Companies

(1) *Conditions Under Which They May Do Business; Annual License Fee*—A surety company with a paid-up capital of $250,000 and having a surplus of $100,000, incorporated under the laws of any state of the United States other than the state of Oregon, either solely or among other things for the purpose of transacting business as surety on obligations of persons or corporations, may transact such surety business in this state upon complying with the provisions of this act and not otherwise. Every such surety company must show to the insurance commissioner of this state that it is possessed of the capital and surplus required by this section, and shall pay to such commissioner the sum of $100 annually in advance for a license to transact such surety business in this state. If such surety company is engaged in any other business it shall pay fees in addition to the above license for the license or licenses required by law for the transaction of such other insurance business. Any surety company organized under the laws of this state having a paid-up capital of not less than $100,000, and a surplus of $50,000, and having its principal office within the state of Oregon, organized either solely, or among other things, for the purpose of transacting business as surety on obligations of persons or corporations, may, upon showing to the insurance commissioner of this state that it is possessed of the capital and surplus required by this section

and that all of such capital is in the actual possession of said company and unimpaired, be accepted, as shall likewise foreign surety companies, which shall comply fully with the above requirements, as sole surety on all bonds, undertakings, recognizances and obligations required by law, or by charter, ordinance, rules, regulations of any municipality, board, body, organization or public officer.

(2) *Amount of Deposit Required*—No foreign insurance company transacting the business of fidelity and surety insurance shall be granted a certificate of authority or the renewal of its annual license, to transact such insurance business in this state, until it has deposited with the treasurer of this state money or bonds of the United States or this state, or interest paying bonds when they are at or above par of any other state of the United States, or the bonds of any county or municipality of this or any other state of the United States, to the actual par and market value of not less than twenty-five thousand dollars ($25,000).

(3) *Deposit to Be Held in Trust for Policyholders; Withdrawal of Securities*—The said money or bonds so deposited with the treasurer of [this] state shall be held in trust for all holders of the obligations of such insurance company, to remain with said treasurer in trust, to answer any default of said company as surety upon any such obligation established by final judgment upon which execution may lawfully be issued against said company; such company, however, at all times shall have the right to collect the interest, dividends and profits upon such securities, and from time to time to withdraw such securities or portions thereof, substituting therefor others of equally good character and value, to the satisfaction of said commissioner, and such securities shall not be sold under any process against such company until after forty (40) days' notice to said company, specifying the date, place and manner of such sale, and the process under which and the purpose for which it is to be made, accompanied by a copy of such process. The state of Oregon shall be held responsible for the safety of all deposits made under the provisions of this section. Such company shall not be permitted to withdraw from the state treasurer such deposit of money or bonds for

a period of one (1) year after discontinuing business within this state, or [nor] while any suit is pending or any judgment against said company in this state shall remain unpaid. Said deposit shall at all times be maintained at said sum of twenty-five thousand dollars ($25,000) or more, and for failure for a period of forty (40) days after notice by the insurance commissioner given by registered letter addressed to the president of said company at its home office to replenish and so maintain the same, the authority of said company to do business in this state shall be revoked by the insurance commissioner.

(4) *State Treasurer to Pay Loss Out of Deposit When Company Fails to Satisfy Judgment*—Should any such company named in this act fail or refuse to pay any loss by it incurred in this state within sixty (60) days after its liability thereupon shall have been by suit finally determined, upon satisfactory proof, to the treasurer of this state, of such liability and of its nonpayment said treasurer shall, out of the deposits so made with him, as by this act provided, pay said loss, and when he shall have done so he shall at once certify to the insurance commissioner the fact of such default on the part of said company, whereupon said commissioner shall forthwith revoke the authority granted to such company and cancel its license to transact business in this state; provided, that such payment shall not operate to release the company from payment of any balance which it still may owe after such payment by the treasurer of this state has been made. [L. 1917, c. 203, pp. 388-390.]

Section 6438, Oregon Laws. Requirements to be Complied by Surety Company

(1) *Requirements in General*—No surety company shall directly or indirectly transact business in this state until it has complied with the requirements of every law of this state applicable to such company, including the following requirements: It must be authorized, under its charter and under the laws of the state where it is incorporated, to become surety upon a bond, undertaking, obligation, recognizance, or guaranty; it must file with the insurance department a certified copy of its articles of incorporation, and a written application

for authority to do business under this act; it must also, if it is not incorporated under the laws of this state, immediately after this act goes into effect, and on or before the renewal or issuing of its license, appoint a resident general agent on whom legal service, if any necessary, may be made; such power of attorney shall be filed with the insurance department and shall stipulate and agree on the part of the company that any legal process against the company which is served on said attorney shall be of the same legal force and validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding in this state.

(2) *Foreign Company to Show Compliance With Requirements of Federal Government*—No foreign or alien insurance company, transacting the business of surety and fidelity insurance, shall be authorized to transact such business in this state except during such time as it shall comply with all the requirements of the federal government relative to such company, and hold unrevoked a certificate of the secretary of the treasury of the United States, showing that such company is qualified to write bonds for the federal government. All such companies doing business in this state shall file quarterly a certified copy of the certificate from the secretary of the treasury showing such qualification; provided, that no surety company doing business in this state shall assume a liability on any one risk in an amount greater than ten (10) per cent of its capital and surplus, as determined by the United States treasury department standard, unless the same shall be reinsured in some other solvent company in such an amount as shall reduce its liability on said risk to ten (10) per cent of its capital and surplus; provided further, that any company failing or refusing to comply with all the provisions of this section, shall be disqualified from doing business in this state, and its license shall be revoked by the insurance commissioner.

(3) *Companies Authorized to Make Agreements for Taking Collateral Security, and the Withdrawing of Funds by Receivers, Trustees, Executors, etc.*—It shall be lawful for any company engaged in the surety business to contract for and to receive and hold on deposit and in trust, as collateral, security on any contract of guaranty or suretyship executed

by it, any property of any kind, and to manage, realize on, and dispose of, the property so received and held on deposit as may be agreed to between such company or corporation and the person, partnership, association or corporation making such deposits; and it shall also be lawful for any receiver, assignee, guardian, conservator, trustee, executor, administrator, or other fiduciary or party from whom a contract of guaranty or suretyship is by law required or permitted to agree and arrange with such a company or corporation for the deposit for safe-keeping of any or all moneys, assets and other property for which he or it is or may be responsible with a bank, savings bank, safe deposit or trust company authorized by law to do business as such in such manner as to prevent the withdrawal or alienation of such money, assets or other property, or any part thereof, without the written consent of such surety or sureties, or an order of the court of competent jurisdiction or a judge thereof, made on such notice to such company or corporation as the court or judge may direct; and generally, it shall be lawful for such a company or corporation to enter into any contract of indemnity or security with any person, partnership, association or corporation; provided, that such contract is not otherwise prohibited by law or against public policy.

(4) *May Underwrite the Bonds of Public Officers; Justification of Surety Company*—Whenever any bond, undertaking, recognizance, or other obligation is or may hereafter be, by law, or the charter, ordinance, rules, or regulations of any municipality, board, body, organization, court, judge, or public officer, required or permitted to be made, given, tendered, or filed with surety or sureties, and whenever the performance of any act, duty, or obligation, or the refraining from any act is or may hereafter be required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance, or guaranty may be executed by a surety company qualified to transact a surety business in this state, and holding a license from the insurance commissioner to make such insurance, and such execution by such company of such bond, undertaking, obligation, recognizance, or guaranty, shall be in all respects a full and complete compliance with every requirement of every law,

charter, ordinance, rule, or regulation that such bond, undertaking, obligation, recognizance, or guaranty shall be executed by one surety, or by one or more sureties, or that such sureties shall be residents or householders, or freeholders, or either or both, or possess any other qualification; and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers of every character, shall accept and treat such bond, undertaking, obligation, recognization, or guaranty, when so executed by such company, as conforming to and fully and completely complying with every such requirement of every such law, charter, ordinance, rule or regulation. A surety company may be required to justify as surety; provided, that it shall be sufficient justification for such surety company when examined as to its qualifications to exhibit the certificate of authority issued to it by the insurance commissioner or a certified copy of same.

(5) *Expense of Bonds May Be Allowed by Court*—Any receiver, assignee, guardian, trustee, executor, administrator, or other fiduciary, required by law or the order of any court or judge to give a bond or other obligation as such, may include, as a part of the lawful expense of executing his trust, such reasonable sum paid a company for becoming his surety on such bond as may be allowed by the courts in which, or a judge before whom, he is required to account, not exceeding 1 per centum per annum on account of such bond; and in all actions and proceedings a party entitled to recover disbursements therein shall be allowed and may tax and recover such sum paid a person or company for executing any bond, recognizance, undertaking, stipulation, or other obligation therein, not exceeding, however, 1 per cent on the amount of such bond, recognizance, undertaking, stipulation or other obligation during each year the same has been in force.

(6) *Cost of Public Official's Bond, How Paid*—Any state, county or municipal officer or officer of any school district, public board or public commission within the state, or the deputy or deputies employed in the office of any such official, who is, or may be, required by law, ordinance, regulation, or public policy, to give a bond for the faithful performance of his duties, shall be allowed such reasonable sum paid a surety

company for becoming surety on his bond, not exceeding one-half of 1 per centum per annum on account of such bond; and such premium shall be paid out of the proper state, county, municipal, district, board or commission funds.

(7) *Surety Company Executing Bond Estopped to Deny Corporate Existence*—Any surety company which shall execute any bond or undertaking, under the provisions of this act, shall be estopped, in any proceeding, to deny its corporate power to execute such bond or undertaking or to assume such liability, and all such bonds or undertakings shall in any action pleading such defenses be construed by the rules applicable to contracts of insurance and indemnity. [L. 1917, c. 203, pp. 390-393.]

(31358)

Supreme Court of the United States

OCTOBER TERM, 1925
(No. 635)

No. 185 on the Summary Docket
OCTOBER TERM, 1926

WILL MOORE,
Insurance Commissioner of the State of Oregon,
Appellant,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY and NATIONAL SURETY COMPANY, *Appellees.*

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellees

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FIDELITY AND DEPOSIT COMPANY OF MARYLAND, HARTFORD ACCIDENT AND INDEMNITY COMPANY and NATIONAL SURETY COMPANY, *Appellees.*

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellees

Statement of the Case

On March 26, 1924, appellees filed in the District Court of the United States for the District of Oregon, their bill of complaint (R. 1), in which it is alleged that they are foreign corporations, being incorporated under the laws of states other than Ore-

gon, and "legally engaged in the business of insurance as defined by Section 6322, et seq., Oregon Laws, and commonly called the Insurance Code of said state * * * ; that prior to engaging in said business in said state of Oregon, and more than three years prior to the institution of this suit, each of said plaintiffs had duly and legally qualified to transact such business as a foreign insurance corporation."

Following the above is a statement that the various steps and proceedings were taken as required by Oregon Laws to qualify plaintiffs to engage in the insurance business in Oregon as foreign corporations.

It is further alleged in complaint that on May 25, 1921, the then Insurance Commissioner of Oregon issued to appellees his certificate of approval and authorization of the automobile confiscation coverage described in complaint (R. 5).

On November 20, 1923, appellant, the present Commissioner, issued his "Department Bulletin No. 25," in which he attempted to cancel and annul the authorization and license issued to appellees by his predecessor (R. 7), on the ground therein stated, that the coverage was "void as against public policy."

The complaint further alleges that appellant's action was arbitrary, unauthorized and an assumption of non-existent authority, and will jeopardize appellees' confiscation bond, underwriting business, and injuriously affect their standing and reliability, and entirely destroy their general business and good will in said state, thereby causing inestimable and irreparable damage and depriving them of their

property without due process of law, in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States (R. 8).

There was no prayer for an injunction against the enforcement, operation or execution of any statute upon the ground of the unconstitutionality of such statute or otherwise.

On April 12, 1924, appellant filed a motion to dismiss complaint (R. 10).

On January 12, 1925, the Court dismissed the above motion, and rendered its written opinion therein (R. 10), in which the Court held that appellees were duly licensed under the Oregon Laws as foreign insurance companies (R. 11), and that "they do not insure against the actual results of a confiscation for a violation of the law, or the penalty inflicted or the damages sustained by the culprit. They cover nothing but the loss of property of the insured, like fire, theft or embezzlement insurance, the last two of which necessarily involve criminal acts of the person committing the same, although not the person injured. The vendee is not a party to the contract, and is no more protected by it than is a thief who steals an automobile covered by theft insurance" (R. 13).

On January 16, 1925, appellant filed his answer to the complaint (R. 14).

On January 22, 1925, appellees filed a motion to strike practically all of the answer (R. 19).

On February 5, 1925, the Court sustained appellees' motion to strike (R. 21).

On May 18, 1925, a final decree was entered on stipulation of appellant that he declined to further answer (R. 22).

Under Section 6623, Oregon Laws, the Insurance Commissioner is authorized to enforce the laws, and to issue departmental rules and orders necessary to secure the enforcement of such laws, but he is not vested with power to deny citizens their rights or privileges under the law.

Points and Authorities

I.

JURISDICTION.

An appeal to the Supreme Court of the United States does not lie from the decree of the District Court in this suit.

This is not a proceeding to suspend the enforcement of the statute of a state, or of an order made by an administrative board or commission created by and "acting under the statute of a state," covered by Sec. 238 of the Judicial Code.

Act of Feb. 13, 1925, 43 Stat. c. 229, p. 938. (Sec. 238 Judicial Code);

Act of Feb. 13, 1925, 43 Stat. c. 229, p. 938. (Sec. 266 Judicial Code.)

II.

This is not a suit for an injunction suspending or restraining the enforcement, operation or execution of any statute of a state, or restraining the action of any officer of such state in the enforcement or execution of any statute, or in the enforcement or

execution of any order made by any administrative board or commission acting under and pursuant to the statutes of such state, nor is it a proceeding attacking the constitutionality of any such statute, as provided for in Section 266 of the Judicial Code.

It did not require the presence of three judges.

Act of March 4, 1913, 37 Stat., p. 1013, c. 160, as amended by the Act of February 13, 1925, 43 Stat., p. 938, c. 229 (Sec. 266 Judicial Code);

In re Buder, 46 S. Ct. (Advance Opinions No. 17) 557, 558, 70 L. Ed. (Advance Opinions No. 16) 634, 635, 636.

Michigan State Telephone Co. v. O'Dell, et al., 283 Fed. 139.

Likins v. Chesapeake & Ohio Railway Company, 209 Fed. 573, 126 C. C. A. 395.

Live Oaks Water Users' Association, et al., v. Railroad Commission of the State of California, 46 S. Ct. (Advance Opinions No. 6), 149, 70 L. Ed. (Advance Opinions No. 7), 167, 168.

The Commissioner had no power under the Oregon statute to issue said Order or Department Bulletin No. 25.

Oregon Laws, Sec. 6324, 6326.

III.

The contracts of insurance in this case are not in contravention of public policy.

Owens v. Henderson Brewing Company, 215 S. W. Rep. 90.

Stephens v. Southern Pacific Company, 41 Pac. 783 (29 L. R. A. 751).

Taxicab Motor Company vs. Pacific Coast Casualty Company, 132 Pac. 393.

Berry on Automobiles, 3 Ed., Sec. 1617, p. 1435.

4th Joyce Law of Insurance, Sec. 2531b, p. 4217.

(Note: 6 A. L. R. 377.)

Fidelity and Deposit Company of Maryland, et al., v. Moore, Insurance Commissioner of Oregon, 3 Fed. Rep. (2nd Series) 652.

Fidelity and Casualty Co. v. Eikoff, 30 L. R. A. 586.

Midland Motor Co. v. Norwich Union Fire Insurance Society, et al., 72 Mont. 583, 234 Pac. 482.

IV.

The policies of insurance issued by appellees were fully authorized under the Oregon statutes.

See Oregon Laws, Sec. 6322, 6328, 6337, 6338, 6343.

Argument

Under Sections 238 and 266 of the Judicial Code and the decisions hereinbefore cited under "Points and Authorities," it is believed that appellant has not the right to have the decree of the District Court reviewed in this Court. It is in no way sought in this proceeding to suspend the enforcement of any state statute or order made by any administrative board or commission created by and "acting under the statute of a state." Appellees respectfully suggest that the acts of the Insurance Commissioner of

Oregon complained of were wholly arbitrary and not authorized by any law or statute.

That portion of Section 266 of the Judicial Code applicable to this question is in the following language: "No interlocutory injunctions suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court or by any District Court of the United States, or by any judge thereof, or by any Circuit Judge acting as District judge, upon the ground of the unconstitutionality of such statute, etc."

This suit is not instituted for any of said purposes. No question is raised by appellees as to the constitutionality of any statute. The complaint does not seek to restrain the action of any officer in the enforcement or execution of any statute or in the enforcement or execution of any order made by a commissioner "acting under or pursuant to the statutes of such state." Under no statute of Oregon was appellant vested with power arbitrarily to cancel or withdraw the license issued by his predecessor after appellees had fully complied and continued to comply with all of the provisions of Oregon statutes qualifying and authorizing them to transact the kind of insurance business covered by the license granted.

The Insurance Commissioner of Oregon, under Section 6324, Oregon Laws, is charged with the execution of the laws and not with the power of enacting laws for the state. He is, under Section 6326, Oregon Laws, vested with the "Power to enforce all of the laws of the state relating to insurance," and he shall "issue such department rules, instructions and orders as he may deem necessary to secure the enforcement of the provisions of this act." In the performance of his duty, however, he is not vested with power to set aside the laws of the state or arbitrarily to deprive citizens of their rights or protection thereunder. He is further required, under the terms of the last section, to issue the certificates provided for by the act.

The Insurance Contracts in Question Are Not Void as Against Public Policy.

It is said on page 28 of appellant's brief that public policy will not permit the enforcement of a contract which offers a temptation to violate the law and which undertakes to indemnify another against the consequences of an act which is illegal. Our answer to this statement is that the insurance issued by appellees to automobile dealers in no manner offers any temptation to violate the law. No possible advantage could flow to either the insurer or the assured in acts which would or might result in the confiscation of the assured's property. The contract in no sense undertakes to indemnify another against the consequences of any act committed by him which is illegal. Under the very terms of the contract, it is provided that if the assured is a party to the violation of the prohibition laws, the policy of insurance becomes void as a result of such act.

It is provided in the contract of insurance that the liability thereunder shall in no case exceed the actual cash value of the automobile at the time of the confiscation and not more than two-thirds of the purchase price thereof, nor more than the amount of the unpaid installments on the purchase price thereof, payable by the vendee, exclusive of any interest thereon (R. 3).

It is further stated in page 39 of appellant's brief that any agreement "which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal and void." We will have to concede the correctness of this statement. There is, however, involved in this suit, no agreement for the violation of any law.

It seems to us that it is, and ought to be, as lawful for a dealer in automobiles to protect himself by insurance against loss through the illegal acts of purchasers from the dealers as it is for banks and employers to insure themselves against loss by theft, embezzlement, misapplication of funds, etc. In the Montana case of *Midland Motor Company versus Norwich Union Fire Insurance Society, Limited, et al.*, 72 Montana, 583; 234 Pacific 482 (quoted from on page 41 of appellant's brief), the rule is clearly stated as follows: "It is not questioned in this case but that it is competent and legal to insure the vendor of an automobile against the confiscation thereof for a violation of the National Prohibition Act by a person other than the vendor." The trial court in the present case, after a careful review of the authorities, arrived at the same conclusion, and it seems to us that any other conclusion would defeat rather than promote public policy.

On page 44 of appellant's brief there are quotations from 6 R. C. L. 757 and 31 C. J., page 425, Section 17b. The portions of these authorities here quoted apply to contracts "having for their subject matter" an interference with the due enforcement of law, and contracts by which the party undertakes "to indemnify the other against the consequences of an act which is illegal." The contracts issued by appellees have no such purpose or effect; they neither have for their subject matter an interference with the enforcement of law, nor to indemnify the assured against the consequence of any act committed by him which is illegal.

From the statements contained on page 45 of appellant's brief, it seems to be his idea that it would promote the public welfare and conform to the rule of public policy to make it impossible to dispose of motor vehicles under partial payment contracts. In this connection we call the Court's attention to the fact that automobile production is the largest manufacturing industry in the United States.

It is stated in the Commerce Year Book for 1925, published by the United States Department of Commerce, at pages 394 and 395, that—

> "The automobile industry stands first among the manufacturing industries in value of products. The value of its output (United States only) in 1925, according to the preliminary figures of the last biennial census, was $3,372,000,000.00."

We are not possessed of accurate knowledge as to the proportion of automobile sales which are covered by conditional sales contracts, but we feel safe

in making the statement that more than ninety per cent of the automobile sales business in the United States is effected through conditional sales contracts and that the adoption of the narrow application of the rule of public policy suggested by appellant, would defeat the very purpose of the rule.

Every statement contained in paragraphs III and IV (pages 47 to 59, inclusive, of appellant's brief) is sufficiently answered by mere reference to the allegations contained in the complaint (R. 1) and the provisions of the pertinent sections and subdivisions thereof of Oregon Laws which are quoted below.

Section 6322, being a part of the Oregon Insurance Code, defines the general scope and meaning of the term "insurance," as contemplated and covered by the provisions of the code, as follows:

> "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event, whereby the insured or his beneficiary suffers loss or injury."

Section 6328, Oregon Laws, covers the issuance of licenses to foreign insurance companies, the provisions of which have been fully complied with as stated in complaint.

Section 6337, Oregon Laws (subdivision 1), provides that "a company, association, partnership or individual engaged in the business of insurance or suretyship, or of guaranteeing against liability, loss or damage, or of entering into contracts substantially

amounting to insurance, shall be deemed an insurance company," etc.

Section 6338, Oregon Laws (subdivision 1):

> "Any insurance company, which has qualified to transact its appropriate business in this state, may be licensed to transact any of the classes of insurance defined in this section or permitted under the laws of this state, and which it may transact under its charter or articles of incorporation and the laws of the state in which it has its home office or United States Department office."

Section 6343, Oregon Laws:

> "Insurance companies may be organized in the state, and foreign and alien companies may be granted permission, to transact the business of accident, health, liability, elevator, plate glass, steam boiler and fly wheel, burglary and theft, sprinkler, leakage, automobile and teams property damage, credit, title, fidelity and surety, live stock, workmen's collective insurance and *insurance against any other loss or casualty,* which may lawfully be the subject of insurance and for which no other provision is made by the laws of the state," etc.

At the outset, we feel that the Court will weigh this question with a due regard to public interest and welfare, and that it will not overlook the fact that the manufacture and distribution of automobiles have come to be, within recent years, one of the very large industries within the United States. In the convenient distribution of automobiles, it is essential that sales establishments shall be main-

tained in the hundreds of urban communities throughout the country. The distributors, as a rule, do not possess sufficient financial strength to conduct an automobile sales establishment without being enabled to discount the notes and conditional sales contracts with banks or automobile financing corporations. The purchasers of this class of paper, or those who lend money upon the same, demand that these notes and contracts be made secure against the contingencies of loss by accident, fire, theft and confiscation.

The rule, therefore, of public policy should not be so applied or construed as to unnecessarily injure or interfere with the convenient and economical distribution of a present day American life necessity.

Broadly defined, "public policy" is that principle which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, and the Courts universally hold in applying this rule, that extreme caution should be exercised, to the end that more harm than good may not result from the application of the rule.

This class of insurance is required, not for the purpose of encouraging or abetting the carrying of intoxicating liquors, but to preserve to the vendor his security for the unpaid portion of the purchase price of the machine sold, and it is in the same category with fire, embezzlement and burglary protection. While it is true that in some isolated instances a vendor might connive at the destruction by fire, or the embezzlement of an automobile, or its use in transportation of intoxicating liquors, yet it must be

remembered that the contract provides that the vendor is insured only against

> "All direct loss or damage which he may sustain caused by the confiscation of said automobile by reason of the violation (*otherwise than by said vendor*) of the provisions of the national prohibition act";

and, further, that

> "It is warranted that the vendor has had no notice or knowledge that the vendee is unreliale, dishonest or unworthy of confidence."

In view of the extent and nature of the transactions in this country, involving conditional automobiles sales contracts, it is in the interest of the public, rather than opposed thereto, that the seller shall have the benefit of insurance against each and all of the causes of loss above enumerated, equally so with relation to loss through the illegal act of the transportation of intoxicating liquors by the person to whom the dealer gives a conditional contract of sale, as against loss by fire, theft or other of the possible causes of loss. It will not be contended that contracts insuring against embezzlement and theft are contrary to public policy. Such contracts have long been issued and regularly upheld by the Courts, and it seems to us that the contract insuring against the unlawful act of the purchaser of an automobile from the insured is not more in conflict with the rule of public policy than a contract of insurance against the unlawful act of a thief in stealing an automobile from the insured. It is true that many insurance contracts necessarily involve, to a greater or less extent, questions of public policy, but in construing these contracts the Courts give considera-

tion to the question as to what will be in the best interest of the public.

Instances of violation of the prohibition laws by the purchasers of automobiles, having confiscation coverage, constitute an extremely small percentage of the many automobile sales contracts carrying this class of coverage. It seems to be erroneonsly assumed by appellant that it is the desire, or in the interest of the insurer and the insured, that automobiles on which confiscation coverage is carried shall engage in the unlawful business of transportation of intoxicating liquors in violation of law. Neither the insurance company nor the seller can be said to be in any measure parties to or promoters of this class of violation of law.

The contract of insurance in no way undertakes to indemnify the insuring vendor of the automobile against the consequences of a violation of any law by himself, or by any one else with his consent or permission, in any greater degree than a contract to indemnify against loss by embezzlement, theft, or burglary. In the first case, he is insured against loss by reason of the violation of the prohibition or revenue laws. In the second case, he is insured against loss by reason of a violation of the penal statutes relating to embezzlement or theft of his property. In either case, it is only the loss of property against which he is indemnified.

In neither case is he indemnified against any unlawful act on his part. In neither case is he a party to the violation. Such violations would be against the interest of the insured. He cannot, therefore, be said to connive at, aid in, or even wish that the law should be violated. So far as the parties to the con-

tract are concerned, we repeat, then, that they are guilty of no design which has for its purpose or aim a violation of law, and that the writing of policies of this character are as justifiable, lawful and necessary as the issuance of policies against other classes of loss in conducting any other legitimate business.

The interest of both the insurer and the insured is involved in discouraging and preventing, if possible, the violation of the law. It cannot be successfully urged against this confiscation coverage that its purpose is unlawful or that it contemplates the commission of any offense against either state or federal prohibition or internal revenue laws, or that either the insurer or insured, at the time of the making of such contracts, had in mind else than the protection of the security and the preservation of the law, and, unless the contract manifestly discloses such unlawful purposes, it is not contrary to public policy.

This principle is in keeping with the great weight of authority and is well stated in the case of *Owens vs. Henderson Brewing Company,* decided by the Supreme Court of Kentucky, October 1, 1919, where it is said, among other things:

> "Courts are very unwilling to ascribe to a contract an illegal or unlawful purpose, and will not do so unless such purpose is manifest. The construction which harmonizes with the law and good morals will be given to the contract."

215 S. W. Rep., page 90.
6 R. C. L., Section 135, page 730.

See also *Stephens vs. Southern Pacific Company*

Cal.), 41 Pac. 783 (29 L. R. A. 751), in which the law of public policy is in part defined as follows:

"The foregoing line of reasoning is ingenious, but we cannot endorse it as sound in law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents' position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound policy, the court will never so declare. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' *Richmond v. Dubuque & S. C. R. Co.*, 26 Iowa, 191. "Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malem in se*, to be void, as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.' *Kellog v. Larkin*, 3 Pinney, 125, 56 Am. Dec. 164. 'No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled policy of this state, or injurious

> to the morals of its people'. *Swann v. Swann,* 21 Fed. Rep. 299."

In an action to enforce the insurance contract covering damage to an automobile, the defendant company sought to escape liability on the ground that at the time of the accident the automobile was being driven by a boy under eighteen years of age, in violation of law. In this case, the defendant relied upon the case of *Mullen vs. Hoffman,* 174 U. S. 639, and the case of *Levy vs. Kansas City,* 168 Fed. 524. The Court, however, said:

> "I do not question the principle announced in those cases. Neither do I question the proposition that, if the insurance policy in question undertook by its express terms to indemnify the plaintiff against damages resulting to him because of *his* violation of a criminal statute, he could not recover."

The presumption is that an agreement that is not *malum in se* is a valid exercise of the constitutional right which one citizen has to contract with another, and upon him who suggests that the engagement is void, is cast the onus of showing that the same is, in fact, not theoretically, against public policy, or injurious to public morals.

The policy of the law is to uphold contracts, not to destroy them; and if this principle is not strictly adhered to, then nearly every species of insurance contract may be voided upon mere supposition that its execution may result in a violation of law.

These confiscation bonds promise no protection to the offender and afford him no advantage over any other lawbreaker. They merely engage that if

perchance the purchaser of the automobile, without participation on the part of the vendor, violates the law in the use of the vehicle, and the same is seized by the authorities, and is not returned to the vendor, the insurance company shall reimburse the vendor in a sum not to exceed the actual cash value of the confiscated automobile or the amount of the total unpaid installments due on the contract.

In *Taxicab Motor Company vs. Pacific Coast Casualty Company*, 132 Pacific 393, the Court discusses the rule of public policy as follows:

> "The only question that is open to the appellant, therefore, is whether such a contract is void as against public policy. Answering this question we are clear that the contract is not so void. Undoubtedly a contract indemnifying another against the consequences arising from wilful violations of a statute, *or from the commissions of crime generally, committed by the assured himself, is void for the reasons given, but one may lawfully insure another against the consequences of such acts committed by his servants or employes, if such acts are not directed or participated in by the assured.* If this were not so, bonds taken to insure against the misappropriation or embezzlement of funds by employes generally would be void, and we need not go beyond our own decisions to find authority to sustain obligations of this character."

The quotation as given above is accepted by text writers on insurance as correctly stating the law. (Berry, Automobiles, 3d Ed., Section 1617, p. 1435; 4th Joyce, Law of Insurance, Sec. 2531b, p. 4217; note, 6 A. L. R. 377.)

The distinction between insurance against wilful, unlawful acts of the assured himself, as contrasted with insurance against the acts of third parties has evidently appeared so obvious that only in a very few instances has attack been made against policies of the latter class on the ground that such policies were contrary to public policy. In each instance the contention was denied.

Fidelity & Casualty Co. vs. Eikoff, 30 L. R. A. 586;

4th Joyce Law of Insurance, Sec. 2531b.

Larceny, burglary and theft policies are conceded as serving lawful and useful purposes. It is said in the note to 46 L. R. A. (N. S.) 562:

> "With the enlarging scope of the insurance business and its branches, policies indemnifying against losses by burglary, theft and larceny have become common, and such policies are upheld and given effect by all courts."

In the case of *Gould vs. Brock,* 69 Atl. 1122, the court, in commenting on the changing views as to the scope of insurance, remarks:

> "There was a time when all insurance, and especially life, was looked upon with suspicion and disfavor, but it was only because regarded as a species of wagering contract. That time has long gone by. And, with intelligent study of political economy bringing the recognition of the fact that even the most sporadic occurrences are subject to at least an approximate law of averages, the insurance against loss from any such occurrence has been recognized as a legitimate subject of protection to the individual by a guaranty of indemnity from some party un-

dertaking to distribute and divide the loss among a number of others for a premium giving them a prospect of profit."

The contention that the confiscation bond is contrary to public policy takes no account of the constant expansion of modern business interests and the need for protection thereof.

There is no form of insurance that can be restricted to the use of upright and honorable men. Crooks and criminals will, upon occasion, be able to use it for unlawful purposes. Newspapers frequently carry reports of attempts at arson to collect fire insurance; the commission of murders to secure the life insurance of the victim; scuttling of ships to realize on the marine insurance. It would hardly be said, however, because of these instances that such insurance is void by reason of being in contravention of public policy.

In the proper application of the public policy rule, with respect to the carrying on of the automobile business, it seems to us that these confiscation contracts have a tendency to benefit, rather than to injure the public.

It is said that the duty is imposed upon the insurer to exercise care to see that the automobile is not used in violation of the laws, and it is urged that the insurance contract under consideration tends to relieve the plaintiff from that duty. It is respectfully submitted that it is humanly impossible for dealers in automobiles to conduct their business in such way as to confine their sales solely to law-abiding citizens. Without being in any manner guilty of negligence or indifference as to the character of

the persons to whom sales are made, it is inevitable in the very nature of the business itself that in a few isolated instances there may be violations of the prohibition laws, by means of the use of the automobile sold by the dealer. It is reasonable to assume, however, that the dealer would be more cautious in the protection of his own interest under a conditional sales contract than in case of a cash sale. It would be against his interest to sell an automobile upon partial payment to one who is likely to violate the law in such way that the automobile may become involved in confiscation proceedings.

Policies against loss through embezzelment by employes, and through loss by burglaries and theft, exclusively apply to and cover losses incident to violations of law. If it is proper to insure against loss by reason of the negligence of the insured, if it is lawful to insure the employer against embezzlement by his employes, if it is lawful to insure against loss through burglary, then, it seems to us, that it is not unlawful for the automobile dealer to insure against the possible loss through the unlawful act of a purchaser, concerning whom the assured warrants that he has no notice or knowledge of unreliability, dishonesty, or unworthiness of confidence.

It has been suggested that confiscation coverage would encourage attempts to defeat the purposes of the prohibition laws. It is not improper that the insurer, as well as the insured, shall exercise the right of lawfully defending their interests in a proceeding for the confiscation of the property in which they have an interest. There is, however, nothing in the contract which suggests that they would resort to any illegal methods in the protection of these in-

terests. Even in bonds upon appeal in criminal cases, the parties are expected to use every legitimate means to accomplish the reversal of the judgment, and such bonds are required by law.

The coverages for embezzlement, theft or burglary are not regarded as being invalid upon the theory that they either encourage the commission of crimes, or prevent the punishment therefor, nor should confiscation insurance, which is of the same fundamental character, be subject to any different rule.

The only purpose and design of the contract is to protect the seller against the possible loss by the illegal use of the automobile sold, involving a risk over which the very nature of the business suggests the impossibility of the seller being able to otherwise protect himself. Particularly is this true with respect to the necessity of the dealer discounting his partial sales contracts, or notes, in order that he may keep himself sufficiently financed to carry on an automobile sales business. There is nothing in the nature of the transaction which properly suggests the purpose or design on the part of the insurer or the insured to aid or promote transgressions of law. On the other hand, every consideration of interest of both the insurer and insured is involved in the desire on their part that there shall be no violation of law.

In the written opinion delivered by the Trial Court in the case covered by this appeal, District Judge Bean said:

> "The controlling question, therefore, in the case is whether the confiscation coverage contracts in question are against public policy and void. The courts always proceed with caution

when invoked to declare a contract void on the ground of public policy and will not do so unless such purpose is manifest. It is presumed that parties intend legal contracts and contemplate no violation of the law where the subject matter thereof is not forbidden by law or the declared policy of the state. The power of courts to declare a contract void because in contravention of public policy is a very delicate and undefined power and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. (*Stephens et al., vs. S. P.,* 41 Pac. 783.) It is not easy to give a precise definition of public policy. It is said to be that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good, as declared by the law and decisions of the courts. (*Spaulding vs. Maillet,* 188 Pac., 377.) Any contract which has for its manifest purpose or tendency to interfere with the due enforcement of law, or which offers a temptation to violate the law, or which undertakes to indemnify another against the consequences of an act which is illegal is void. (6 R. C., p. 757; 14 R. C., p. 887; 31 C. J., p. 425; *Cooper vs. N. P.,* 212 Fed. 533.) If the purpose and intent of the contracts involved in this case is to indemnify the assured against the violation of law by himself or with his permission or to hamper or impede the enforcement of the law against the actual offender, they would unquestionably be against public policy and void. But they do not undertake to indemnify the vendor of an automobile against the consequences of a violation of law by himself, or by any one else by his consent or permission. Indeed, it is provided that in the latter event the contract shall not be effective, nor do they interfere with nor impede the due enforcement of

the law against the offender, or confer protection on or indemnity to him. The purpose and effect is not to protect a violator of law, but to guarantee to the vendor his security if the law should be violated by his vendee without his knowledge or consent. It cannot be distinguished in principle it seems to me, from insurance issued to employers indemnifying them against loss or damage on account of the defalcation or embezzlement of their employes, and such contracts are common and have never been considered void on the ground of public policy so far as I know.

It may be said that the contracts would have a tendency to make the vendor of an automobile negligent in investigating or inquiring as to the character of his vendee, or the business in which he proposed to engage, but the same may be said with reference to fire insurance on buildings occupied by tenants, or contracts to reimburse the insured against liability to those who suffer from the negligence of their employes. Because a temptation to negligence may probably result from an insurance policy it cannot be said that the insurance policy necessarily begets negligence. (*Cal. Ins. Co. vs. Union Compress Co.*, 133 U. S. 387; 6 R. C. L. 730.)

It is argued that the lien of a vendor of an automobile sold on credit is fully protected from loss by reason of a violation by his vendee of the state and federal prohibition laws. This is not so clear. It is true that under Section 11, Chapter 29, Laws of Oregon, 1923, and the Section 26 of the National Prohibition Act (41 St. at L. 315), the interest of an innocent vendor of an automobile who retains title or a mortgage thereon to secure the unpaid purchase price is not forfeited by the seizure of the vehicle for a violation by his vendee of the prohibition law

(*Oakland Motor Co. vs. U. S.*, 295 Fed. 626), but whether the costs and expenses of the seizure are a prior lien on the vehicle in case its value is not equal to the lien of the vendor is an unsettled question.

But however that may be, by the Act of Congress of November 23, 1921, (St. at L. 222), all laws in regard to the manufacture, taxation and traffic in intoxicating liquor, and all penalties for the violation of such laws that were in force when the National Prohibition Act was enacted are continued in force and effect (*U. S. vs. Stafoff*, 260 U. S. 477), and under those laws a vehicle used by one who has it on credit from the owner in the removal or concealment of intoxicating liquors with intent to defraud the United States of the tax thereon is subject to seizure and forfeiture, although the owner or lien holder is without notice of and not a party to the forbidden use. (*Goldsmith-Grant Co. vs. U. S.*, 254 U. S. 505.) The interest of a vendor in an automobile sold on credit is, therefore, not fully protected by the provisions of the state and federal prohibition laws referred to.

In my judgment the confiscation bonds proposed to be issued by the plaintiffs do not contravene public policy. They are not forbidden by law and do not undertake to indemnify the assured against damages resulting to him because of his violation of the law, or that of any one else with his knowledge or permission. Nor do they interfere in the slightest degree with the prosecution of offenders against prohibition or other laws. They promise no protection to the offender and afford him no advantage over other law breakers. They are merely agreements on the part of the insurance companies that if perchance the purchaser of an automobile should violate the law and the vehicle be

seized by the authorities and not returned to the vendor it will reimburse the vendor for his loss or damage on account of such seizure in a sum not exceeding the balance unpaid on the purchase price. By the express terms of the contracts the insured warrants that he has no notice or knowledge that his vendee is unreliable, dishonest or unworthy of confidence, and agrees that the policy shall not apply or be in force in case of a violation of the law by himself or with his knowledge or permission.

They do not insure against the actual results of a confiscation for a violation of the law, or the penalty inflicted or the damages sustained by the culprit. They cover nothing but the loss of the property of the insured, like fire, theft or embezzlement insurance, the last two of which necessarily involve criminal acts of the person committing the same, although not the person insured. The vendee is not a party to the contract, and is no more protected by it than is a thief who steals an automobile covered by theft insurance."

We earnestly urge that it would be the extreme of injustice to penalize the entire automobile industry by holding void contracts of insurance because an occasional purchaser uses an insured automobile in the illegal transportation of intoxicating liquors. It would be opposed to the general welfare or public policy to so hold.

Respectfully submitted,

GRIFFITH, PECK & COKE,

Franklin T. Griffith,
John S. Coke,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 185.—October Term, 1926.

Will Moore, Insurance Commissioner, Appellant, *vs.* Fidelity and Deposit Company et al.	Appeal from the District Court of the United States for the District of Oregon.

[November 1, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

Three companies licensed to do business in Oregon brought this suit against its insurance commissioner in the federal court for that State. The bill alleges that a former commissioner had authorized these companies to issue indemnity bonds, commonly called "Confiscation Coverage," by which those who sell automobiles on conditional sale are insured against loss arising from their confiscation for violation of law; that the defendant has entered an order cancelling this authorization, on the ground that insurance of this nature is void as against public policy because it serves to encourage the transportation of intoxicating liquors in violation of law; and that he has threatened to annul the plaintiffs' licenses, unless they refrain entirely from writing such indemnity bonds. The bill charges that the defendant's action is in excess of the powers conferred upon him by the statutes of the State; and that his wrongful acts will, unless restrained, deprive plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. The bill prays for both a preliminary and a permanent injunction.

The defendant moved to dismiss the bill, on the ground that it did not state facts sufficient to constitute a cause of action. The motion was overruled. An answer was filed. Parts of it were stricken out on plaintiff's motion. What remained admitted substantially all the allegations of the bill. The case was then heard further by a single judge, who on May 18, 1925, entered a final decree for an injunction. The constitutional question presented by the bill was not passed upon. The decision was rested solely

upon the ground that the order complained of was in excess of the powers conferred by the statutes upon the insurance commissioner. 3 F. (2d) 652. An appeal to this Court was allowed by the District Judge. A motion having been made to advance the case for argument, this Court, of its own motion, entered a rule that the appellant show cause why the appeal should not be dismissed for lack of jurisdiction in this Court. Upon return to the rule, the case was set for argument.

The bill invoked the jurisdiction of the federal court on the ground of diversity of citizenship as well as on the ground that plaintiffs' constitutional rights were threatened. Although the constitutional question raised was not passed upon by the District Court, the allegations of the bill would have supplied the basis for a direct appeal under § 238 of the Judicial Code before that section was amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938. Compare *Winchester* v. *Winchester Water Works*, 251 U. S. 192, 193. But § 238 was so far changed by that Act, that now there is no right to a direct appeal on constitutional grounds alone; the right exists now only in cases falling within the provisions enumerated in that section as amended. Otherwise the case must go in the first instance to the Circuit Court of Appeals and may come here only for review of that court's action. See *Application of Buder*, 271 U. S. —.

The Act of 1925 applies, as the decree of which review is sought was entered after May 13, 1925. Among the provisions enumerated in § 238 as amended is § 266 of the Judicial Code. It is contended that this case falls within the latter section. It was amended by the addition of the following provision: "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." Appellant contends that this appeal lies under § 266, because the order of the insurance commissioner is an order of an administrative board; and the suit is one which seeks relief by way of "interlocutory injunction suspending or restraining . . . the enforcement . . . of an order made by an administrative board . . . acting under and pursuant to the statutes of such State . . upon the ground of unconstitutionality . . ."

In the case at bar there was an attack upon the order of the insurance commissioner "upon the ground of unconstitutionality" within the meaning of § 266. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 292. It may be assumed that the order was action of an administrative board within the meaning of that section. Compare *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426. But the prayer for a preliminary injunction was not pressed; nor was there any request that the case be heard by a court consisting of three judges, which would have been necessary under § 266 if the prayer had been pressed. That section as originally enacted applied only where interlocutory relief was actually sought, regardless of the scope of the bill. Its purpose was to minimize, in an important class of cases, the delay incident to a review of a decree granting or denying an interlocutory injunction. The general purpose of the Act of 1925 was to relieve this Court by limiting further the absolute right to a review by it. There is nothing in the provision added by that Act to § 266 which indicates a purpose to extend the application of that section—either as to the requirement of three judges or as to the right to a direct appeal—to a case in which an interlocutory injunction was not actually applied for. The occasion for the provision was considered in the *Buder* case. It authorizes a direct appeal to this Court from the final decree of the district court only where an application was made for an interlocutory injunction and the case was heard before three judges.

Dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.